Supreme Court, U.S.
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No. ___

IN THE

Supreme Court of the United States

SHAREEF COUSIN,
Petitioner,

v.

BYRON BERRY AND ROGER JORDAN,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

CLIVE A. STAFFORD-SMITH
636 Baronne Street
New Orleans, LA 70113
(504) 558-9867

DONALD B. VERRILLI, JR.
Counsel of Record
IAN HEATH GERSHENGORN
JENNER & BLOCK, LLC
601 Thirteenth Street, N.W.
Washington, DC 20005
(202) 639-6000

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QUESTION PRESENTED

Whether the Fifth Circuit correctly held – in conflict with *Moore v. Valder*, 65 F.3d 189 (D.C. Cir. 1995), and contrary to the decisions of this Court in *Buckley v. Fitzsimmons*, 509 U.S. 529 (1993), and *Kalina v. Fletcher*, 522 U.S. 118 (1997) – that county prosecutors were acting as advocates and were thus entitled to absolute immunity when they allegedly coerced and fabricated false witness testimony, detained defense witnesses to prevent them from testifying at trial, and failed to provide obviously exculpatory material to the defense prior to trial, all as part of an alleged effort to ensure that an innocent person would be convicted of capital murder.

LIST OF PARTIES

Pursuant to Rule 14.1(b), the following list identifies all of the parties before the United States Court of Appeals for the Fifth Circuit.

Shareef Cousin was the appellant below. Byron Berry and Roger Jordan, assistant district attorneys for Orleans Parish, and Harry Connick, individually and in his capacity as District Attorney for Orleans Parish, were appellees below.

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PETITION FOR A WRIT OF CERTIORARI

Shareef Cousin respectfully submits this petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the court of appeals is reported at 325 F.3d 627 and is reprinted at Pet. App. 1a-20a. The opinion of the district court is unreported and is reprinted at Pet. App. 21a-39a.

JURISDICTION

The opinion and judgment of the court of appeals were entered on March 24, 2003. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

This case involves 42 U.S.C. §§ 1983, 1985. These provisions are reproduced at Pet. App. 43a-45a.

STATEMENT OF THE CASE

The Fifth Circuit below granted absolute immunity to respondents Byron Berry and Roger Jordan, assistant district attorneys from Orleans Parish in Louisiana, for their alleged role in a coordinated effort to ensure the conviction of an innocent person for capital murder. In order to secure a conviction, respondents are alleged to have coerced false testimony and fabricated evidence, issued illegal subpoenas to coerce and intimidate potential witnesses, detained

defense witnesses to prevent them from testifying, and engaged in the wholesale, unconstitutional suppression of obviously exculpatory evidence. As a result of these efforts, petitioner Shareef Cousin, who was then sixteen years old, was convicted and sentenced to death for a crime he did not commit, ultimately spending more than a year on death row before the Louisiana Supreme Court overturned his conviction. *See State v. Cousin*, 710 So. 2d 1065 (La. 1998).

The decision of the Fifth Circuit that respondents were acting in their "advocatory" role and were thus entitled to absolute immunity squarely conflicts with a decision of the D.C. Circuit, as the Fifth Circuit itself acknowledged. *See* Pet. App. 10a n.6. Moreover, the Fifth Circuit's radical expansion of the definition of advocacy to cover virtually all actions performed by a prosecutor after the existence of probable cause cannot be squared either with the functional and historical analyses mandated by this Court in *Buckley v. Fitzsimmons*, 509 U.S. 259 (1993), and *Kalina v. Fletcher*, 522 U.S. 118 (1997), or with this Court's repeated admonition that lower courts be "quite sparing" in their recognition of absolute immunity, *Buckley*, 509 U.S. at 269. Finally, the Fifth Circuit's decision is emblematic of the confusion among the courts of appeals and the disagreement among commentators about the scope of prosecutorial absolute immunity. Review by this Court is thus urgently needed.

A. Background.

This Court is well aware of the expanding list of citizens exonerated from our Nation's death rows.[1] This case

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[1] See Death Penalty Information, *Innocence: Freed From Death Row*, at http://www.deathpenaltyinfo.org/article.php?scid=6&did=110 (providing list of names, including Cousin's name at number 78).

involves the efforts of one member of that group – petitioner Shareef Cousin – to obtain justice for his wrongful conviction.

On March 2, 1995, Michael Gerardi and Connie Babin emerged from dinner at the Port of Call Restaurant in the French Quarter of New Orleans sometime shortly after 10:00 p.m. As they walked toward Gerardi's car, which was parked around the corner, Babin noticed three African-American males approaching the car. One confronted Gerardi and shot him in the course of a robbery. The three then fled. Gerardi died shortly thereafter.

Cousin, who was sixteen years old at the time, was arrested on March 24, 1995, and was indicted and tried for capital murder. At trial, no physical evidence was introduced connecting Cousin to the crime or the crime scene. *See Cousin*, 710 So. 2d at 1067. Indeed, a videotape introduced by the defense demonstrated that Cousin was playing in a recreational league basketball game at the time of the murder and thus could not have been involved in the crime.

The most substantial evidence for the State at trial consisted of Babin's purported eyewitness identification of Cousin as the perpetrator, as well as tentative after-the-fact identifications by other witnesses who claimed to have seen three African-American males in the vicinity of the crime on the evening in question.

The prosecution also sought to demonstrate Cousin's guilt through the testimony of James Rowell, a friend of Cousin's who was also sixteen years old. In its opening statement, the prosecution claimed that Rowell would testify that Cousin had bragged to him about robbing and killing a man in the French Quarter. When called to testify, however,

Rowell denied that Cousin had ever made such a statement. *Id.* at 1067-68. Rowell testified instead that he had previously fabricated this testimony because the prosecutor (Jordan) forced him to do so. *Id.* at 1068. The prosecution introduced testimony to "impeach" Rowell's statement, and then relied on that testimony as substantive evidence of Cousin's guilt. The jury subsequently convicted Cousin and sentenced him to death.

The Louisiana Supreme Court reversed. With respect to Babin's purported identification of Cousin, the Court repeatedly chastised prosecutor Jordan for his failure to turn over critical exculpatory material that would have destroyed the reliability of the identification. As the Court explained:

> When questioned on the night of the murder, Babin told the police that she did not get a good look at the gunman and probably would not be able to identify him. Babin further stated, in an interview at her house three days later, that she was not wearing her glasses or contact lens on the night of the murder and could only see patterns and shapes.

Id. at 1066. The defense did not discover this until after Cousin had been convicted of murder. *Id.* at 1066 n.2.

The Louisiana Supreme Court also held that the prosecution's use of the testimony introduced to "impeach" Rowell was fundamentally unfair. Among other things, the court held that the conviction was unlawful because of the "prosecutor's flagrant misuse of that evidence for purposes that the prosecutor himself admitted was an improper use." *Id.* at 1072.

The State thereafter announced its intention to retry Cousin. As the retrial proceedings began (with new defense counsel in place), however, a cascade of revelations of illegal conduct undertaken by the police and prosecution to frame Cousin caused prosecutor Jordan to consent to the defense's motion to recuse Jordan from any further participation in the case, and eventually led the State to dismiss all charges against Cousin.

B. The Pattern of Official Misconduct.

As set forth in the unusually detailed allegations contained in the complaint, Pet. App. 46a-118a, Cousin's arrest and conviction for capital murder were the product of a sustained campaign by respondents and members of the New Orleans Police Department to ensure the conviction of an innocent teenager for capital murder.

It was clear from the outset that Shareef Cousin had no involvement in the murder of Mr. Gerardi. According to police records, Gerardi was murdered at 10:10 p.m. Compl. ¶ 63, Pet. App 61a. On the night of the murder Cousin was playing basketball in a game sponsored by the New Orleans Recreation Department, and the game had not ended at the time the murder took place. *Id.* ¶ 61, Pet. App. 61a. The game was videotaped by the brother of one of the players, and the videotape was turned over to the prosecution. *Id.* ¶ 150, Pet. App. 85a.

Respondents and the New Orleans police nevertheless continued to seek out – and indeed to fabricate – evidence to convict Cousin. Cousin was taken into custody on the basis of a search and arrest warrant that was supported by an affidavit from Officer Anthony Small, one of the defendants below. The affidavit rested principally on a supposed tip provided to the "crimestoppers" hot line. Small, however,

had conspired with a friend to fabricate the "tip" in order to take advantage of a $10,000 reward offered by local merchants for information leading to arrest of the killer. *Id.* ¶¶ 73-78, Pet. App. 64a-65a. Small then relied on this manufactured tip to support a warrant for Cousin's arrest, and he and his friend split the reward money. *Id.* ¶ 77, Pet. App. 65a.

In a similar vein, Small's affidavit purported to rest on photo identifications by Babin and by two other witnesses to the events on the night of the crime. As the Louisiana Supreme Court subsequently found, however, Babin had given the police statements making clear she could not identify the murderer. *Id.* ¶¶ 103-108, Pet. App. 72a-73a. As would later be revealed, the police records made clear that the other supposed identifications were equally suspect. *Id.* ¶¶ 115-123, Pet. App. 76a-78a. The state trial judge presiding over the retrial proceeding concluded that most of the key facts in the affidavit were false, and known to be so, when made.

Moreover, Officer Small fabricated the initial aspects of the case against Cousin notwithstanding the fact that there was another – apparently truthful – "crimestoppers" tip provided to the police that identified the real perpetrators of the Gerardi murder. The tip stated that three persons (Antonio Harper, Derrick Smith, and "Brandon") had committed the killing, and that they drove a red Ford 4-door. *Id.* ¶ 83, Pet. App. 66a. That tip corroborated evidence the police received from a witness to the events surrounding the murder, who saw the killers leave in their car and used his binoculars to identify the car's license plate. That license plate was matched to a red Ford 4-door owned by Christell Baham. *Id.* ¶¶ 84-85, Pet. App. 66a-67a. Ms. Baham, as it turns out, is the mother of Derrick Smith. *Id.* ¶ 86, Pet. App.

67a. When the police went to the house to interview Harper and Smith, the red Ford was parked outside. *Id.* ¶ 87, Pet. App. 68a. None of this information was revealed to the defense. *Id.*

Once Cousin had been taken into custody, the police and prosecutors continued their systematic efforts to manufacture a case against him, suppressing evidence that implicated other suspects, concealing exculpatory facts regarding alleged eyewitness identifications, and attempting to intimidate witnesses favorable to the defense. *See generally id.* ¶¶ 124 - 179, Pet. App. 78a-93a (providing numerous examples of misconduct).

Respondents Berry and Jordan played a critical role in seeking to ensure that the campaign against Cousin initiated by the police officers would succeed. Indeed, as the complaint alleges and as evidence developed in other proceedings demonstrates, Berry and Jordan worked hand-in-hand with their police counterparts to fabricate the case against Cousin, and to secure a conviction notwithstanding their knowledge that the evidence against Cousin was deeply flawed and that Cousin was, in fact, innocent.

As relevant to this petition, the complaint alleges that Berry and Jordan were involved in at least three distinct abuses. First, Berry and Jordan misused their investigative powers in an effort to manufacture false evidence against Cousin, by participating with police officers in the effort to coerce false incriminating testimony from James Rowell.

Second, both before and during trial, Berry and Jordan intervened to prevent witnesses from testifying favorably to Cousin. Prior to trial, respondents used illegal "DA subpoenas" to coerce potential witnesses to speak with them,

in an effort to cast doubt on the timing of the basketball game.[2]

Then, while the trial was ongoing, Berry and Jordan instructed four of these potential witnesses to leave the area of the courtroom where Cousin's case was being tried, and to report to the D.A.'s office for the duration of the trial. Compl. ¶¶ 170-171, 175, Pet. App. 90a-91a. The four witnesses – Romanza Hayes, Michael Doss, Don Mathieu, and James Smith – all would have testified based on personal knowledge that Cousin was playing in the recreational league basketball game that did not end until after 10 p.m., and that Cousin thus could not have been at the scene of the crime when the murder occurred. *Id.* ¶¶ 171-174, Pet. App. 90a-91a. As a result of the detention and sequestration of these potential witnesses, the witnesses were unavailable at trial and did not testify on Cousin's behalf. *Id.* ¶ 170, Pet. App. 90a.[3]

Finally, the prosecution engaged in a thorough and systematic effort to conceal exculpatory evidence that would have precluded any possibility of Cousin's conviction. As the Louisiana Supreme Court noted, Berry and Jordan suppressed evidence that would have fatally undermined

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[2] The prosecutors used so-called "Article 66 subpoenas" to obtain testimony from defense witnesses for use at trial and to intimidate defense witnesses to prevent them from testifying on Cousin's behalf. *See id.* ¶¶ 155-168, Pet. App. 86a-89a. Those subpoenas, which suggested that the prospective witnesses had to report for interviews on pain of contempt, were unlawful because they were issued without the requisite prior judicial approval.

[3] At the hearing on the Motion for a New Trial, Berry and Jordan admitted that they had secreted defense witnesses in the D.A.'s office. *See id.* ¶¶ 171, 175, Pet. App. 90a-91a.

Connie Babin's purported identification of Cousin. But that was the tip of the iceberg. Berry and Jordan had in their files, but did not disclose, documents indicating that the purported identifications that supported Officer Small's affidavit were either unreliable or never took place. *Id.* ¶¶ 101-102, Pet. App. 71a-72a. They also had in their files, but did not disclose, reams of evidence implicating other likely suspects. *See, e.g., id.* ¶¶ 82-99, Pet. App. 66a-71a. And they had in their files, but did not disclose, other evidence establishing that Cousin could not have committed the murder, including some statements supporting Cousin's alibi and other statements from eyewitnesses who specifically excluded Cousin as the perpetrator. *Id.* ¶¶ 117-118, 119, Pet. App. 76a-77a.

C. The District Court Proceedings.

Cousin filed his complaint on January 7, 2000, alleging that his arrest, trial, conviction, and incarceration were based on a pervasive pattern of falsification and abuse and violated numerous provisions of the U.S. Constitution, federal and state statutory law, and the common law.

Defendants Berry and Jordan moved to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) or for summary judgment pursuant to Fed. R. Civ. P. 56, asserting that, even if the allegations in the complaint were true, the prosecutors had absolute immunity for all such actions. On June 4, 2001, the district court granted the motion and dismissed all of the claims against Berry and Jordan.[4]

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[4] Cousin's complaint also named as a defendant District Attorney Harry Connick, as well as Officer Small and the other New Orleans police officers involved in the effort to frame Cousin. The district court granted Connick's motion for dismissal on the basis of qualified immunity, and the Fifth Circuit affirmed. The claims against the officers have been

With respect to the allegations that Berry and Jordan had improperly coerced witness testimony, the court held that "[e]ven though plaintiff alleges that defendants coerced or conspired with some of these witnesses to present false evidence at trial . . . the presentation of false evidence to the trial court necessarily implicates an assistant district attorney's prosecutorial function and, accordingly, is shielded by absolute immunity." Pet. App. 28a. In reaching that result, the court did not distinguish between the creation of false evidence on the one hand and the presentation of that evidence at trial on the other.

The district court similarly held that absolute immunity barred Cousin's claim that Berry and Jordan had unlawfully detained important defense alibi witnesses during trial, and thus had deprived Cousin of the ability to present his defense. Using a temporal rather than a functional analysis, the court noted that the detentions "occurred *during* the trial" and held that they were not actionable because Berry and Jordan are "absolutely immune for their actions during the presentation of the State's case." Pet. App. 27a.

Finally, the district court concluded without discussion that respondents were entitled to absolute immunity with respect to Cousin's claims that the prosecution had systematically hidden massive amounts of exculpatory evidence. *Id.*

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stayed in the district court pending resolution of the prosecutors' claim of absolute immunity. The propriety of those actions is not at issue in this petition.

The district court certified its order as final under Fed. R. Civ. P. 54(b), Pet. App. 40a–42a, and Cousin took an immediate appeal.[5]

D. The Fifth Circuit's Decision.

In a published opinion, the Fifth Circuit affirmed, although it disagreed with much of the reasoning of the district court. The Court addressed first the allegations that respondent Jordan had coerced and fabricated the testimony of witness Rowell. Although this Court has repeatedly held that a functional rather than a temporal analysis of immunity is appropriate, the Fifth Circuit held that "the question of absolute immunity turns on whether Cousin had been identified as a suspect at the time Rowell was interviewed and whether the interview related to testimony to be presented at trial." Pet. App. 11a. Because Rowell's own declaration purportedly clarified that, before Rowell and assistant District Attorney Jordan ever met, Rowell "had already talked to the police, [Rowell's lawyer] had already advised him that he 'needed to give up Shareef on the murder,' and Jordan had already talked with [Rowell's lawyer]," *id.* at 12a, the Fifth Circuit concluded that "Jordan was functioning as an advocate when he allegedly instructed Rowell to lie," *id.*

The Fifth Circuit acknowledged that the D.C. Circuit had held in *Moore v. Valder*, 65 F.3d 189 (D.C. Cir. 1995), that "absolute immunity is inapplicable with respect to allegations of witness tampering, because such activity is

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[5] Although there was arguably some ambiguity whether the district court's initial order satisfied the requirements of Rule 54(b) when Cousin first filed his appeal, Cousin requested, and the district court issued, an unambiguous Rule 54(b) final judgment *nunc pro tunc*. *See* Pet. App. 40a-42a; *see also id.* at 5a-6a.

directed at 'the collection of information to be used in a prosecution.'" Pet. App. 10a n.6 (quoting *Moore*, 65 F.3d at 194). The Fifth Circuit concluded, however, that *Moore* was "inconsistent" with Fifth Circuit precedent, and that that the D.C. Circuit had adopted "a much narrower conception of the advocacy role than is justified by [Supreme Court precedent]." *Id.*

Turning to the claim that the prosecutors detained defense witnesses, the Fifth Circuit affirmed the district court's remarkable conclusion that detaining – indeed kidnapping – defense witnesses in order to prevent them from testifying is part of a prosecutor's advocacy function. Although purporting to reject the district court's reliance on a temporal rather than a functional analysis, the Fifth Circuit emphasized that the timing of events "can be highly relevant to the inquiry into function." Pet. App. 17a. The Fifth Circuit concluded that the detention of witnesses was "directly related to the trial process, was entered into in the context of an ongoing trial, and was designed to secure a conviction." *Id.* In these circumstances, according to the court of appeals, the detention of witnesses to prevent them from testifying in criminal proceedings "cannot be characterized as anything other than advocatory." *Id.*

Finally, the Fifth Circuit held that absolute immunity was appropriate even for the unconstitutional suppression of massive amounts of exculpatory evidence such as that alleged in Cousin's complaint. The Fifth Circuit noted its concern that "the specter of litigation could undermine prosecutors' ability to exercise their independent judgment with respect to the initiation and conduct of criminal proceedings." Pet. App. 15a. The court of appeals viewed the loss of potentially meritorious claims as a "regrettable but necessary cost" of the need to ensure the "vigorous and

fearless performance of the prosecutor's duty." *Id.* (citation and internal quotation marks omitted).

REASONS FOR GRANTING THE PETITION

In recent years, this Court has narrowed and sought to clarify the scope of prosecutorial absolute immunity. The Court has emphasized, for example, the need to be "'quite sparing'" in the recognition of "absolute immunity," *Buckley*, 509 U.S. at 269 (quoting *Forrester v. White*, 484 U.S. 219, 224 (1988)), reflecting the presumption "that qualified rather than absolute immunity is sufficient to protect government officials in the exercise of their duties." *Burns v. Reed*, 500 U.S. 478, 486-87 (1991). The Court has thus limited prosecutorial absolute immunity to actions performed by prosecutors in their "advocatory role," and it has defined the test for advocacy as a functional one that "looks to 'the nature of the function performed, not the identity of the actor who performed it,'" *Buckley*, 509 U.S. at 269 (quoting *Forrester*, 484 U.S. at 224). A prosecutor seeking absolute immunity "bears the burden of showing that such immunity is justified for the function in question," *Buckley*, 509 U.S. at 269 (quoting *Burns*, 500 U.S. at 486), and must show both that the challenged activity falls within a "common-law tradition of absolute immunity for a given function," and that recognition of absolute immunity is not inconsistent with "§ 1983's history or purposes." *Id.*

Notwithstanding this recent jurisprudence, the decisions in the courts of appeals reflect widespread analytic confusion over the proper scope of prosecutorial absolute immunity, prompting substantial criticism by commentators, and – most troubling of all – resulting in an overly expansive definition of advocacy that effectively immunizes the vast majority of prosecutorial conduct.

The Fifth Circuit's decision below is emblematic of this confusion. With barely a nod to this Court's functional analysis and without any analysis of the "common-law tradition," the Fifth Circuit held that local prosecutors were performing an "advocatory function" when they "instructed [a witness] to lie," Pet. App. 12a, when they undertook the "detention of witnesses to prevent them from testifying [for the defense] in criminal proceedings," *id.* at 17a, and when they "suppressed significant exculpatory evidence in violation of *Brady v. Maryland*," *id.* at 14a (citation omitted). The result of the Fifth Circuit's decision is that prosecutors are absolutely immune for virtually all activity that occurs after the existence of probable cause, whether that activity occurs before, at, or during trial.

Review of the decision below is urgently needed. At the outset, the Fifth Circuit's extension of absolute immunity for coercing false testimony conflicts directly with the D.C. Circuit's decision in *Moore v. Valder*, 65 F.3d 189 (D.C. Cir. 1995). In *Moore*, the D.C. Circuit held that "[i]ntimidating and coercing witnesses into changing their testimony is not advocatory." *Id.* at 194. In reaching the contrary conclusion below, the Fifth Circuit acknowledged the split with *Moore*, but concluded that the D.C. Circuit had adopted "a much narrower conception of the advocacy role" than the Fifth Circuit believed was justified. Pet. App. 10a n.6.

More important, the Fifth Circuit's decision represents a vast expansion of this Court's immunity doctrine. This Court has held that absolute immunity attaches to the function, not the office, so that, for example, "[w]hen the functions of prosecutors and detectives are the same, . . . the immunity that protects them is also the same." *Buckley*, 509 U.S. at 276. In *Buckley*, the Court denied absolute immunity for a prosecutor alleged to have fabricated false evidence,

noting that the prosecutor's actions were no different from those that might be taken by a detective. *Id.* And in *Kalina*, the Court denied absolute immunity to a prosecutor who executed a sworn certification in support of a warrant, noting that the prosecutor "performed an act that any competent witness might have performed." *Kalina*, 522 U.S. at 129-30.

The Fifth Circuit's extension of absolute immunity to the coercion and fabrication of false testimony and the detention of defense witnesses is flatly inconsistent with these precedents. The fabrication and coercion of false testimony is action that could be performed by any police officer and that requires no "exercise of prosecutorial discretion." *Id.* at 125. Under *Buckley* and *Kalina*, that activity is investigative and merits only qualified, not absolute, immunity. As the D.C. Circuit held, "intimidating and coercing witnesses into changing their testimony" is "a misuse of *investigative* techniques" that "relates to a typical police function, the collection of information to be used in a prosecution." *Moore*, 65 F.3d at 194; *see also Milstein v. Cooley*, 257 F.3d 1004, 1011 (9th Cir. 2001) (stating that "acquiring known false statements from a witness for use in a prosecution is likewise fabricating evidence that is unprotected by absolute immunity").

Similarly, because the detention of defense witnesses to prevent them from testifying could be performed by anyone – a police officer, a marshal, or even a member of the public – and requires no special legal skill or training, a prosecutor who engages in such activity is entitled to, at most, qualified immunity under *Buckley* and *Kalina*.

The Fifth Circuit's decision to immunize all of the conduct at issue in the complaint is particularly troubling given this Court's admonition that the grant of absolute immunity is to be "quite sparing." Indeed, the Court has

consistently cabined the scope of absolute immunity for prosecutors, *see, e.g.*, *Kalina*, 522 U.S. at 131; *Buckley*, 509 U.S. at 273-78; *Burns*, 500 U.S. at 496 (no absolute immunity for giving legal advice to police); *Mitchell v. Forsyth*, 472 U.S. 511, 520 (1985) (no absolute immunity for U.S. Attorney General exercising national defense functions), and it has actively resisted efforts to expand absolute immunity more generally, *see, e.g.*, *Clinton v. Jones*, 520 U.S. 681, 694-95 (1997) (President not entitled to absolute immunity from civil suit); *Antoine v. Byers & Anderson, Inc.*, 508 U.S. 429, 437 (1993) (court reporter not entitled to absolute immunity); *Forrester v. White*, 484 U.S. 219, 229 (1988) (state judge not entitled to absolute immunity for decision to demote and dismiss probation officer); *Malley v. Briggs*, 475 U.S. 335, 342 (1986) (police officer not entitled to absolute immunity for conduct involved in applying for warrant); *Harlow v. Fitzgerald*, 457 U.S. 800, 808-13 (1982) (Presidential aides not entitled to absolute immunity).

Unfortunately, the expansive understanding of immunity reflected in the decision below, although flatly inconsistent with this Court's precedent, is all too common in the courts of appeals. The Fifth Circuit, for example, routinely grants absolute immunity with respect to allegations of prosecutorial misconduct like the ones presented here. *See, e.g.*, *Brandley v. Keeshan*, 64 F.3d 196 (5th Cir. 1995) (absolute immunity for allegations that prosecutor intimidated witnesses in an effort to suppress their testimony); *Mowbray v. Cameron County*, 274 F.3d 269, 276-77 (5th Cir. 2001) (absolute immunity for allegations that prosecutor "shopped for witnesses" to support baseless theory) *cert. denied*, 535 U.S. 1055 (2002).

Other Circuits as well, with the exception of the D.C. Circuit in the *Moore* decision, have expanded prosecutorial absolute immunity far beyond what this Court's precedents permit. *See, e.g.*, *Hill v. City of New York*, 45 F.3d 653, 662 (2d Cir. 1995) (prosecutor is absolutely immune for allegations of "deliberate fabrication of false evidence" to the extent the fabrication involves out-of-court efforts to control a witness' that "are made subsequent to the decision to indict"); *Carter v. Burch*, 34 F.3d 257, 261-63 (4th Cir. 1994) (absolute prosecutorial immunity is appropriate for allegation that prosecutor "coached [the witness] not to testify" in a way that would have helped the defendant); *see generally* Megan M. Rose, Note, *The Endurance of Prosecutorial Immunity – How the Federal Courts Vitiated* Buckley v. Fitzsimmons, 37 B.C.L. Rev. 1019, 1019-20 (1996) ("When the United States Supreme Court handed down its opinion in *Buckley v. Fitzsimmons* in June 1993, the decision was heralded as the beginning of the end of absolute prosecutorial immunity. . . . Whatever threat *Buckley* may have posed to the highly deferential doctrine of prosecutorial immunity, however, has not yet materialized.").

The consequences of this confusion among the courts of appeals are severe. First, there is doctrinal incoherence. Despite this Court's emphasis on the importance of the "common-law tradition" in justifying absolute immunity, immunity is routinely extended without any serious historical analysis and when common-law analogues are clearly absent.[6] Similarly, despite the emphasis on the role of absolute immunity in helping the judicial process by giving prosecutors the freedom to bring evidence before the court,

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[6] *See, e.g.*, Pet. App. 9a-14a, 16a-18a (extending absolute immunity for alleged fabrication of evidence and detention of witnesses without identifying any common-law tradition of immunity for these functions).

see, e.g., *Imbler v. Pachtman*, 424 U.S. 409, 426 (1976), immunity is routinely granted for prosecutors' efforts to suppress evidence or otherwise prevent evidence from getting before the finder of fact.[7] And despite paying lip service to a functional analysis, the lower courts have adopted probable cause as a bright line demarcation – even though all nine Justices *rejected* such a bright line in *Buckley*, *see supra* pages 22-23 – resulting in prosecutors' receiving absolute immunity when officers performing the same function at the same time would not.[8]

Unsurprisingly, academic commentators have decried this state of affaris and called for the Court to revisit the doctrine. *See, e.g.*, Felice F. Guerrieri, Comment, *Law & Order: Redefining the Relationship Between Prosecutors and Police*, 25 S. Ill. U. L.J. 353, 375 (2001) (arguing that Court should reconsider absolute immunity doctrine in light of the frequency of prosecutorial misconduct); Douglas J. McNamara, Buckley, Imbler *and* Stare Decisis*: The Present Predicament of Prosecutorial Immunity and an End to Its Absolute Means*, 59 Alb. L. Rev. 1135, 1195 (1996) (advocating explicit overturning of *Imbler* because, among other flaws, its extension of absolute immunity to withholding of exculpatory evidence is inconsistent with Court's functional and historical approach); Lesley E. Williams, *The Civil Regulation of Prosecutors*, 67 Fordham L. Rev. 3441, 3457 (1999) (noting that lower courts differ widely in their determinations of whether an action

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[7] *See, e.g.*, Pet. App. 14a-18a (extending absolute immunity for alleged detention of defense witnesses and suppression of exculpatory evidence); *Hill*, 45 F.3d at 662; *Reid v. New Hampshire*, 56 F.3d 332, 336 (1st Cir. 1995).

[8] *See, e.g.*, Pet. App. 9a-14a; *Hill*, 45 F.3d at 662.

constitutes advocacy or investigation and suggesting that Supreme Court needs to clarify this line).

But this doctrinal incoherence is not a matter of merely academic concern. The extent of prosecutorial immunity is a recurring and important issue in the federal courts. As a result of the persistent refusal of the courts of appeals to hold prosecutors accountable for their constitutional wrongs, the lower courts have denied victims recovery for even the most egregious prosecutorial misconduct, even when (as alleged in this complaint) the misconduct results in the erroneous and unjustified imposition of the death penalty. Because other constraints on prosecutorial misbehavior are largely ineffective,[9] the absence of a remedy under § 1983 permits prosecutorial misbehavior to continue unchecked, undermining the integrity of the very judicial process that absolute immunity is designed to protect.

Against this backdrop, this petition provides an ideal vehicle for the Court's consideration of these issues. The detailed allegations in the complaint describe a range of prosecutorial misconduct that will allow the Court to undertake a full explication of the proper scope of

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[9] *See* Guerrieri, 25 S. Ill. U. L.J. at 375 (noting low reversal rates for prosecutorial misconduct); McNamara, 59 Alb. L. Rev. at 1195 (noting the neglect of bar associations to discipline unethical prosecutors); Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for* Brady *Violations: A Paper Tiger*, 65 N.C. L. Rev. 693, 705, 742 (1987) (arguing that professional sanctions against prosecutors who violate *Brady* are virtually non-existent); Joseph R. Weeks, *No Wrong Without a Remedy: The Effective Enforcement of the Duty of Prosecutors to Disclose Exculpatory Evidence*, 22 Okla. City U. L. Rev. 833, 902 (1997) (arguing that, given absolute immunity, prosecutors have no incentive to turn over exculpatory evidence); Williams, 67 Fordham L. Rev. at 3442 (noting failure of professional disciplinary authorities to discipline prosecutors effectively).

prosecutorial absolute immunity. The decision below squarely confronts the relevant issues, and forthrightly acknowledges a division among the circuits. And the decision below is a particularly egregious example of the lower courts' overly expansive conception of advocacy. Review by this Court is thus appropriate.

I. THE FIFTH CIRCUIT'S EXTENSION OF ABSOLUTE IMMUNITY TO COERCION AND FABRICATION OF FALSE TESTIMONY SQUARELY CONFLICTS WITH A DECISION OF THE D.C. CIRCUIT AND IS CONTRARY TO THE DECISIONS OF THIS COURT.

In the decision below, the Fifth Circuit held that a local prosecutor "was functioning as an advocate when he allegedly instructed [a witness] to lie." Pet. App. 12a. That decision, although consistent with decisions of the Second and Fourth Circuits, squarely conflicts with a decision of the D.C. Circuit, and is flatly contrary to decisions of this Court.

The conflict between the decision below and the decision of the D.C. Circuit in *Moore* could hardly be starker. Cousin and Moore each maintained that prosecutors had intimidated and coerced witnesses into changing their testimony in an effort to secure a conviction. *See Moore*, 65 F.3d at 191 (noting plaintiff's contention that prosecutor Valder "intimidated and coerced witnesses into changing their testimony to incriminate Moore"); Pet. App. 8a (noting plaintiff's contention that prosecutors Berry and Jordan "coerced and intimidated Rowell so that he would give false trial testimony that would implicate Cousin in the Gerardi murder").

These similarities notwithstanding, the Fifth Circuit and the D.C. Circuit reached diametrically opposite results. The

D.C. Circuit concluded that "intimidating and coercing witnesses into changing their testimony is not advocatory. It is rather a misuse of *investigative* techniques legitimately directed at exploring whether the government has acquired all incriminating evidence. It therefore relates to a typical police function, the collection of information to be used in a prosecution." *Moore*, 65 F.3d at 194.

The Fifth Circuit disagreed, holding that because the coercion and fabrication of the Rowell testimony occurred after the existence of probable cause, *see* Pet. App. 13a-14a. (noting that the prosecutors' interview with Rowell "was intended to secure evidence that would be used in the presentation of the state's case at the pending trial of an already identified suspect, not to identify a suspect or establish probable cause"), the prosecutor was acting as an advocate rather than as an investigator. The Fifth Circuit forthrightly acknowledged that its decision conflicted with that of the D.C. Circuit in *Moore*, but concluded that the D.C. Circuit had adopted "a much narrower conception of the advocacy role" that the Fifth Circuit believed justified. Pet. App. 10a n.6.[10]

The Fifth Circuit's broader "conception of the advocacy role," however, is flatly contrary to the Court's decision in *Buckley*. Under *Buckley*, the advocacy for which prosecutors enjoy absolute immunity includes "the professional

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[10] As noted, the Fifth Circuit's expansive notion of advocatory conduct, while in conflict with the approach of the D.C. Circuit, is consistent with the approach taken in other Circuits, including the Second Circuit and the Fourth Circuit. *See, e.g.*, *Hill*, 45 F.3d at 662 (prosecutors immune for allegations of "deliberate fabrication of false evidence"); *Carter*, 34 F.3d at 261, 263 (absolute prosecutorial immunity for allegation that prosecutor "coached [the witness] not to testify" in a way that would have helped the defendant).

evaluation of the evidence assembled by the police and appropriate preparation of its presentation at trial or before a grand jury after a decision to seek an indictment has been made." *Buckley*, 509 U.S. at 273. It does not, however, include the "fabrication of false evidence," *id.* at 275, which is an investigative, rather than an advocatory, function. As the D.C. Circuit stated, "[i]ntimidating and coercing witnesses into changing their testimony is not advocatory," but is instead "a misuse of *investigative* techniques." *Moore*, 65 F.3d at 194 (emphasis in original); *see also Milstein*, 257 F.3d at 1011 (stating that "acquiring known false statements from a witness for use in a prosecution is likewise fabricating evidence that is unprotected by absolute immunity").

The Fifth Circuit reached a contrary conclusion because it understood *Buckley* to have established a bright line inquiry under which the existence of probable cause immunizes subsequent prosecutorial conduct. The question of absolute immunity, the Fifth Circuit stated, "turns on whether Cousin had been identified as a suspect at the time Rowell was interviewed." Pet. App. 11a; *see also id.* (focusing on "whether Cousin had already been charged or arrested at the time of the events alleged").

But the Fifth Circuit's extraction of such a bright-line rule from *Buckley* was fundamentally misguided. Although the majority in *Buckley* determined that a prosecutor is almost certainly acting in a non-advocatory capacity prior to the existence of probable cause, all nine Justices in *Buckley rejected* the suggestion that the existence of probable cause transforms what would otherwise be investigative activity into advocacy. The majority stated, for example, that even after a determination of probable cause, "a prosecutor may engage in 'police investigative work' that is entitled to only

qualified immunity." *Buckley*, 509 U.S. at 274 n.5. Justice Kennedy's opinion dissenting on that issue similarly stated that "even after there is probable cause to arrest a suspect or after a suspect is indicted, a prosecutor might act to further police investigative work." *Id.* at 290 (Kennedy, J., concurring in part and dissenting in part); *see also Zahrey v. Coffey*, 221 F.3d 342, 347 n.2 (2d Cir. 2000) ("All members of the Court recognized . . . that a prosecutor's conduct even after probable cause exists might be investigative.").

The Fifth Circuit sought to bolster its conclusions by emphasizing that "the interview related to testimony to be presented at trial." Pet. App. 11a. But that analysis misses the point, because it focuses on the role the prosecutor plays when using the testimony, rather than the role played when extracting it. An effort to fabricate testimony by coercing a witness to frame a suspect should not become "advocatory" because that same testimony might be used at trial. Such a rule would create perverse incentives for prosecutors to use fabricated testimony and would result in a marked departure from this Court's approach in *Buckley*. As the Court sensibly explained, "[a] prosecutor may not shield his investigative work with the aegis of absolute immunity merely because, after a suspect is eventually arrested, indicted, and tried, that work may be retrospectively described as 'preparation' for a possible trial; every prosecutor might then shield himself from liability for any constitutional wrong against innocent citizens by ensuring that they go to trial." *Buckley*, 509 U.S. at 276.

History, too, condemns the Fifth Circuit's approach, because the court of appeals failed to demonstrate that inducing witnesses to create false testimony was the type of activity that would have been entitled to absolute immunity when § 1983 was passed. To the contrary, a number of

nineteenth-century courts rejected attempts to extend the traditional immunity of witnesses for their in-court statements to cover those persons responsible for inducing the witnesses to commit perjury. *See* Thomas M. Cooley, *A Treatise on the Law of Torts* 248 n.2 (2d ed. 1888); *see also Rice v. Coolidge*, 121 Mass. 393, 395 (1876) (explaining that although a litigant cannot maintain an action against witnesses for their defamatory, false statements in a prior suit, "it does not follow that she may not maintain an action against those who, with malice and intent to injure her, procured and suborned those witnesses to testify falsely").

In short, logic, history, and precedent demonstrate that coercing and fabricating false testimony is advocatory. Such activity neither evaluates evidence assembled by the police, nor prepares that evidence for presentation at trial. Rather, it creates false evidence to implicate the accused, just as a prosecutor or police officer creates false evidence by conspiring to manufacture a link between a suspect and a bootprint the murderer left at the crime scene. *See Buckley*, 509 U.S. at 273. As *Buckley* makes clear, neither a prosecutor nor a police officer would receive absolute immunity for creating such evidence prior to probable cause, and the police officer would plainly not receive absolute immunity even after probable cause. *See id.* at 276 n.6; *see also Pierson v. Ray*, 386 U.S. 547, 555 (1967) (noting that "[t]he common law has never granted police officers an absolute and unqualified immunity"). The treatment of the prosecutor after the existence of probable cause should be no different. *See Buckley*, 509 U.S. at 273 ("When a prosecutor performs the investigative functions normally performed by a detective or police officer, 'it is neither appropriate nor justifiable that, for the same act, immunity should protect the one and not the other.'" (quoting *Hampton v. Chicago*, 484 F.2d 602, 608 (7th Cir. 1973))).

II. THE FIFTH CIRCUIT'S RADICAL EXTENSION OF ABSOLUTE IMMUNITY TO COVER THE UNLAWFUL DETENTION OF DEFENSE WITNESSES TO PREVENT THEM FROM TESTIFYING IS FLATLY INCONSISTENT WITH THE DECISIONS OF THIS COURT.

This Court should also grant review of the Fifth Circuit's extraordinary ruling that a prosecutor's "unlawful and improper" detention of witnesses during trial to prevent them from testifying on Cousin's behalf is protected by absolute immunity. The Fifth Circuit determined that such detention "cannot be characterized as anything other than advocatory." Pet. App. 17a. That determination is a radical expansion of this Court's precedents.

Under any reasonable reading of this Court's immunity decisions, the conduct alleged here – telling defense witnesses where to go and determining how long they will wait there – is far from advocatory. Detaining defense witnesses requires no special legal skill or training. A police officer or even a bystander could just have easily directed traffic in the courthouse. Because police officers would not have absolute immunity for such detention, *see, e.g., Briscoe v. LaHue*, 460 U.S. 325, 342 (1983), the prosecutors should not receive absolute immunity for the same actions. *See Buckley*, 509 U.S. at 276 ("When the functions of prosecutors and detectives are the same, as they were here, the immunity that protects them is also the same.").

This Court's opinions make clear that prosecutors should receive absolute immunity only for activities that must be peformed by lawyers. In *Kalina*, for example, the Court asked whether the prosecutor was acting as a lawyer when

she made false statements to support her application for an arrest warrant. *Kalina*, 522 U.S. at 129. Because "[t]estifying about facts is the function of the witness, not of the lawyer," *id.* at 130, this Court held that the prosecutor's actions were not advocatory, even though they were part of a longer term project to secure a conviction. The Fifth Circuit's approach, then, cannot be squared with this Court's limitation of prosecutorial absolute immunity to that narrow category of activity that can be performed only by lawyers. *See id.*

Furthermore, the Fifth Circuit made no effort to situate its newly-minted immunity in an established "common-law tradition," as this Court's precedents require. *See, e.g.*, *Kalina*, 522 U.S. at 123; *Buckley*, 509 U.S. at 281 (Scalia, J., concurring). Given that the burden of justifying that immunity rests with the defending official, *id.* at 269; *Burns*, 500 U.S. at 486, the Fifth Circuit's failure to identify an applicable common-law tradition precludes a finding of absolute immunity.

Moreover, a historical analysis confirms that absolute immunity is inappropriate here. Nineteenth-century common law recognized the "distinction between ministerial and judicial duties, and the complete immunity secured in the discharge of the latter class, and the liability incurred in the former." *Nash v. People*, 36 N.Y. 607, 617 (1867). Given the absence of absolute immunity for the performance of "ministerial" duties, prosecutors would plainly not have enjoyed absolute immunity for the essentially "administrative" act of detaining defense witnesses, an activity that requires not the slightest bit of legal skill or training. *Cf. Forrester*, 484 U.S. at 229 (holding that state judge was not entitled to absolute immunity for demoting and firing probation officer).

Providing absolute immunity for detention of defense witnesses to prevent them from testifying is contrary also to the purposes behind that immunity. Prosecutorial absolute immunity exists principally so that prosecutors will not be afraid to introduce evidence in court. "If prosecutors were hampered in exercising their judgment as to the use of such witnesses by concern about resulting personal liability, the triers of fact in criminal cases often would be denied relevant evidence." *Imbler*, 424 U.S. at 426; *Briscoe*, 460 U.S. at 335 (quoting Justice White's concurrence in *Imbler*). But it would be perverse to apply this immunity rule to actions of a prosecutor who is alleged to have intentionally *deprived* the court of relevant information. *See generally Imbler*, 424 U.S. at 442-43 (White, J., concurring in the judgment). Such immunity "would discourage precisely the disclosure of evidence sought to be encouraged by the rule granting prosecutors [absolute] immunity." *Id.*

The Fifth Circuit concluded nevertheless that the detention of witnesses was advocatory because the prosecutors' conduct "was directly related to the trial process, was entered into in the context of an ongoing trial, and was designed to secure a conviction." Pet. App. 17a. But the Fifth Circuit focused predominantly on the timing of events. In the Fifth Circuit's view, because the conduct occurred during an "ongoing trial," it must be advocatory and shielded by absolute immunity. *Id.* at 16a-17a. That is simply the wrong analytic approach.

Moreover, the Fifth Circuit's approach is hopelessly at odds with this Court's admonition that absolute immunity is to be applied sparingly. To be certain, detaining witnesses aids the prosecutor's trial effort. But murdering the defendant's witnesses would similarly help the prosecutor's chances at trial, and yet surely such action does not

constitute advocacy. To define "advocacy" to include any action by a prosecutor that occurs during trial and increases the chances of conviction is to read the term so broadly as to deprive it of any meaning. This Court, by distinguishing between advocatory, investigative, and administrative prosecutorial action, has sought to confine absolute immunity to the initiation of a prosecution and to the evaluation, preparation, and presentation of evidence already assembled by police. *Buckley*, 509 U.S. at 273; *see also Imbler*, 424 U.S. at 431 n.33. The Fifth Circuit's approach here cannot be squared with that precedent.

III. THE GRANT OF ABSOLUTE IMMUNITY FOR THE UNCONSTITUTIONAL SUPPRESSION OF EXCULPATORY EVIDENCE HAS NO HISTORICAL ANTECEDENT AND IS CONTRARY TO THE PURPOSES OF THE IMMUNITY DOCTRINE.

Finally, the Court should grant review of the Fifth Circuit's ruling that absolute immunity protects prosecutors who unconstitutionally withhold substantial exculpatory evidence from the defense. It is true that this Court stated in a footnote in *Imbler* that absolute immunity extends to the deliberate suppression of exculpatory evidence, 424 U.S. at 430 n.34, and the courts of appeals have generally adopted the *Imbler* dicta as law. Nevertheless, this Court should take this opportunity to revisit the Court's cursory analysis in *Imbler* for at least three reasons.

First, the approach in *Imbler* is inconsistent with the analytical framework set forth in this Court's subsequent cases. As noted above, this Court's more recent precedents establish that a common-law tradition of immunity for the particular function at issue is a necessary, although not sufficient, condition for absolute immunity under § 1983.

See Buckley, 509 U.S. at 269; *Burns*, 500 U.S. at 497 (Scalia, J., concurring in the judgment). The Court in *Imbler* cited no such common-law tradition with regard to the suppression of evidence and, as Justice White made clear in his concurrence, no such tradition exists. *See, e.g., Imbler*, 424 U.S. at 441 (White, J., concurring in the judgment). The absence of historical roots precludes a finding of absolute immunity.

Second, as noted above, the principal justification for prosecutorial absolute immunity is to give prosecutors the freedom to present witnesses and evidence at trial without the fear of later being sued. *See, e.g., Imbler*, 424 U.S. at 426; *id.* at 442 (White, J., concurring in the judgment) (noting that the "single justification" of absolute prosecutorial immunity was to "encourage [prosecutors] to bring information to the court which will resolve the criminal case"). As Justice White observed, however, it would "stand this immunity rule on its head . . . to apply it to a suit based on a claim that the prosecutor unconstitutionally *withheld* information from the court." *Id.* at 442-43; *see also supra* page 27.

Finally, denial of absolute immunity is appropriate because a § 1983 suit, rather than use of the judicial process, is the principal way to prevent or correct an unconstitutional suppression of evidence. As Justice White observed in *Imbler*, the "judicial process will by definition be ignorant of the violation when it occurs; and it is reasonable to suspect that most such violations never surface. It is all the more important, then, to deter such violations by permitting damages actions under 42 U.S.C. § 1983 to be maintained in instances where violations do surface." *Imbler*, 424 U.S. at 443-44 (White, J., concurring in the judgment). Although criminal liability and professional sanctions exist as

theoretical constraints on prosecutorial behavior, *see, e.g., Burns*, 500 U.S. at 486, in practice these tools are very rarely used. *See, e.g., supra* note 9. Denying prosecutors absolute immunity for egregious violations like the ones here provides prosecutors with proper incentives for compliance with constitutional requirements, while preserving the immunities necessary to permit the proper functioning of the judicial process.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

CLIVE A. STAFFORD-SMITH
636 Baronne Street
New Orleans, LA 70113
(504) 558-9867

DONALD B. VERRILLI, JR.
Counsel of Record
IAN HEATH GERSHENGORN
JENNER & BLOCK, LLC
601 Thirteenth Street, N.W.
Washington, DC 20005
(202) 639-6000

June 23, 2003

Appendix A

United States Court of Appeals,
Fifth Circuit.

Shareef COUSIN, Plaintiff-Appellant,
v.
Anthony SMALL, et al., Defendants,
Byron Berry, Roger Jordan, and Harry Connick, Individually and in His Capacity
as District Attorney for Orleans Parish Appellees.

No. 01-30745.

March 24, 2003.

Clive A. Stafford-Smith, Louisiana Crisis Assistance Center, New Orleans, LA, Donald B. Verrilli, Jr., Ian Heath Gershengorn (argued), Jenner & Block, Washington, DC, for Plaintiff-Appellant.

William Francis Wessel (argued), Victoria Lennox Bartels, Wessel & Associates, New Orleans, LA, for Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before SMITH and BENAVIDES, Circuit Judges, and FITZWATER,* District Judge.

PER CURIAM:

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* District Judge of the Northern District of Texas, sitting by designation.

Shareef Cousin sued employees of the police department and the district attorney's office, alleging various violations of his constitutional rights in connection with his prosecution for the murder of Michael Gerardi. The district court found for defendants on immunity grounds. Finding no error, we affirm.

I.

On March 2, 1995, Gerardi and Connie Babin emerged from dinner at a New Orleans restaurant. As they neared Gerardi's car, three black men approached and robbed them; one of the men confronted Gerardi and fatally shot him.

Later that month, Cousin, then sixteen years old, was charged with the murder. At trial, the state relied solely on testimonial evidence, including Babin's identification of Cousin as the perpetrator. The prosecution also presented testimony from witnesses who claimed to have seen three black men in the vicinity of the crime. At a photo line-up three weeks after the murder, two of these witnesses tentatively had identified Cousin as one of the three men.

Finally, the state presented the testimony of James Rowell, a friend of Cousin's. The prosecution claimed in its opening statement that in August 1995 Rowell had told police of a conversation he had with Cousin in March 1995, in which Cousin admitted to killing a man in the New Orleans French Quarter during an unsuccessful armed robbery. When called to testify, however, Rowell denied that Cousin had made such a statement and claimed that his assertions had been coerced by promises of favorable treatment on pending charges.

The prosecution then called, as impeachment witnesses as to what Rowell had told police regarding Cousin, the attorney who had represented Rowell on the pending charges and a

police officer who was present at the August 1995 meeting. The prosecution later relied on this impeachment testimony as substantive evidence of Cousin's guilt.

The defense presented evidence that at the time of the murder, approximately 10:26 p.m., Cousin was playing in a city recreation department basketball game. Two recreation department supervisors, Cousin's coach, and an opposing team's player testified that the game had started late and ended late, and the coach testified that he dropped Cousin off at his house at approximately 10:45 p.m.

The jury convicted Cousin and sentenced him to death. Cousin spent over a year on death row, but the conviction was overturned for prosecutorial misconduct. *State v. Cousin*, 710 So. 2d 1065 (La. 1998).[1] The court based its reversal on the admission of the testimony of Rowell's attorney and the police officer as impeachment evidence, holding that "even if the issue of admissibility was close, we would be compelled to

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[1] In his opening brief on appeal, Cousin, without citation to the instant record, makes the following assertion:

> The prosecutorial misconduct identified by the Louisiana Supreme Court ... turned out to be the tip of the iceberg. Indeed, the arrest and conviction were the product of a sustained campaign to frame Cousin. A significant part of that effort involved unlawful and unconstitutional actions by numerous officers of the New Orleans Police Department. For the most part, the specifics of these actions are not directly before this Court because they support claims against other defendants in the case--police officers--who are not entitled to absolute immunity, and whose cases remain in the district court.

We express no view on the accuracy of this statement, except to agree with Cousin that our disposition of the appeal by the current appellants is not intended to affect any ongoing proceeding against certain police officers.

reverse this conviction because of the prosecutor's flagrant misuse of that evidence for purposes that the prosecutor himself admitted was an improper use of such evidence" (i.e. the misuse of the testimony as substantive evidence of guilt). *Id.* at 1072.

The court also noted that Jordan had withheld obviously exculpatory material, although the court did not base its judgment on that conduct. *Id.* at 1067 n.2, 1074 n.8. The court explained that, when questioned on the night of the murder, Babin told the police that she did not get a good look at the gunman and probably would not be able to identify him. She also stated, in an interview three days later, that she was not wearing her corrective lenses on the night of the murder and could see only patterns and shapes. The prosecutors did not disclose these statements to the defense, even though the statements would have cast serious doubt on the veracity of Babin's subsequent identification of Cousin.

The state thereafter announced its intention to retry Cousin, but eventually, in January 1999, it dismissed all charges. One year later, Cousin filed the present action under 42 U.S.C. §§ 1983 and 1985, alleging misconduct by the police and the prosecution. Cousin charged that, from the outset, he was the victim of an effort to frame him for the murder and that the police had engaged in numerous instances of misconduct in an effort to manufacture a case against him. Cousin also contended that the prosecutors, Byron Berry and Roger Jordan, had abused their positions in an effort wrongfully to secure his conviction. Cousin also brought claims against the district attorney, Harry Connick, seeking to hold him liable for the alleged failure adequately to train and supervise the prosecutors in his office.

Berry, Jordan, and Connick moved to dismiss the claims under Fed. R. Civ. P. 12(b)(6) or for summary judgment. The district court granted the motions, holding that Berry and Jordan were protected by the doctrine of absolute prosecutorial immunity and that Connick was entitled to summary judgment because the claims against him were barred on grounds of qualified immunity. The judgment did not dispose of Cousin's claims against the police defendants, which have been stayed pending the resolution of this appeal.

II.

Defendants claim this court lacks jurisdiction over the instant appeal. After the district court granted the motions for dismissal and summary judgment, Cousin filed a notice of appeal. The judgment did not dispose of all defendants, and when Cousin filed his notice, the court had not yet issued an unequivocal certification under Fed. R. Civ. P. 54(b). Cousin requested, and the court issued, a rule 54(b) final judgment *nunc pro tunc.* Defendants contend that Cousin's notice of appeal is defective because it was filed before the court entered the rule 54(b) judgment and that, as a result, we lack appellate jurisdiction. We disagree.

"A notice of appeal filed after the court announces a decision or order–but before the entry of the judgment or order–is treated as filed on the date of and after the entry." Fed. R. App. P. 4(a)(2). Under rule 4(a)(2), an appeal from a nonfinal decision may serve as an effective notice of appeal from a subsequently entered final judgment if the nonfinal decision "*would be* appealable if immediately followed by the entry of judgment." *FirsTier Mortg. Co. v. Investors Mortg. Ins. Co.,* 498 U.S. 269, 276, 111 S. Ct. 648, 112 L. Ed.2d 743 (1991).

This court has applied the *FirsTier* rule in the context of the entry of a rule 54(b) certification after a prematurely filed notice of appeal, precisely the situation presented by this case. *Barrett v. Atl. Richfield Co.,* 95 F.3d 375 (5th Cir. 1996). "Because the district court's order would have been appealable if followed by Rule 54(b) certification and order, rule 4(a)(2) permits this court to exercise its jurisdiction," where a final judgment was actually entered subsequent to the filing of the notice of appeal. *Id.* at 379. Under *Barrett,* therefore, we have jurisdiction.

III.

Cousin challenges the dismissal of his § 1983 claims against prosecutors Berry and Jordan on the basis of absolute prosecutorial immunity. We review dismissals under rule 12(b)(6) *de novo,* accepting all well-pleaded facts as true. *Morin v. Moore,* 309 F.3d 316, 319 (5th Cir. 2002)

Section 1983 creates a damages remedy for the violation of federal constitutional or statutory rights. Although the section contains no reference to official immunity, "Congress intended the statute to be construed in the light of common-law principles that were well settled at the time of its enactment." *Kalina v. Fletcher,* 522 U.S. 118, 123, 118 S. Ct. 502, 139 L. Ed. 2d 471 (1997) (citing *Tenney v. Brandhove,* 341 U.S. 367, 71 S. Ct. 783, 95 L. Ed. 1019 (1951); *Briscoe v. LaHue,* 460 U.S. 325, 330, 103 S. Ct. 1108, 75 L. Ed.2d 96 (1983)). Therefore, the immunities existing at common law at the time of § 1983's enactment are applicable to actions brought under it.

In *Imbler v. Pachtman,* 424 U.S. 409, 96 S. Ct. 984, 47 L. Ed. 2d 128 (1976), the Court held that prosecutors are shielded from liability under § 1983 for certain conduct. After

analyzing the absolute immunity afforded prosecutors at common law, the Court concluded that the policy underlying that immunity supports its application to § 1983 claims. Id. at 427. Consequently, "prosecutors are absolutely immune from liability under § 1983 for their conduct in 'initiating a prosecution and in presenting the State's case,' insofar as that conduct is 'intimately associated with the judicial phase of the criminal process[.]'"[2]

The prosecutorial immunity recognized in Imbler, however, does not apply to any and all actions taken by a prosecutor. Rather, the Court fashioned a functional test under which prosecutors are absolutely immune with respect to activities that are "intimately associated with the judicial phase of the criminal process." *Id.* at 430. Conduct falling within this category is not limited "only to the act of initiation itself and to conduct occurring in the courtroom," *Buckley v. Fitzsimmons,* 509 U.S. 259, 272, 113 S. Ct. 2606, 125 L. Ed. 2d 209 (1993), but instead includes all actions "which occur in the course of [the prosecutor's] role as an advocate for the State," *id.* at 273.

Therefore, the central question with respect to each of Cousin's claims against Berry and Jordan is the nature of the conduct upon which the claim is based. If the conduct is advocatory, and therefore related to the defendants' prosecutorial function, absolute immunity applies, and the district court's rejection of the claim was not error.

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[2] *Burns v. Reed,* 500 U.S. 478, 486, 111 S. Ct. 1934, 114 L. Ed. 2d 547 (1991) (citations omitted) (quoting *Imbler,* 424 U.S. at 430-31, 96 S. Ct. 984).

A.

Cousin maintains that Berry and Jordan coerced and intimidated Rowell so that he would give false trial testimony that would implicate Cousin in the Gerardi murder. There is no indication in Cousin's complaint, however, that he alleged a coerced testimony claim concerning Rowell. Although this complete failure seems logically to support dismissal for failure to state a claim, defendants appear to have assumed, in moving for dismissal or summary judgment, that Cousin had asserted such a claim; they did not seek dismissal on the ground that he had not. And Cousin and defendants briefed the claim as though it had been pleaded. We therefore will not affirm on the basis of rule 12(b)(6). Defendants, however, also moved for summary judgment, which we conclude is warranted, because the record establishes that Jordan and Berry[3] were acting as advocates.

1.

At the summary judgment stage of a § 1983 action, a defendant asserting immunity is not required to establish the defense beyond peradventure, as he would have to do for other affirmative defenses.[4] "The moving party is not required to put

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[3] Because the summary judgment evidence shows that Berry's involvement was exceedingly limited, we restrict our discussion to Jordan. Rowell did not refer to Berry in his declaration; in his trial testimony, he stated that, on one occasion, another district attorney had accompanied Jordan to meet with him. Although Rowell could not identify the individual, Berry confirmed, in his deposition, that he had been present once when Jordan and Rowell met.

[4] *Cf. Chaplin v. NationsCredit Corp.*, 307 F.3d 368, 372 (5th Cir.2002) ("To obtain summary judgment, 'if the movant bears the burden of proof on an issue ... because ... as a defendant he is asserting an affirmative defense, he

forth evidence to meet its summary judgment burden for a claim of immunity. It is sufficient that the movant in good faith pleads that it is entitled to absolute or qualified immunity." *Beck v. Tex. State Bd. of Dental Exam'rs,* 204 F.3d 629, 633 (5th Cir.2000). "Once the [movant] *asserts* this affirmative defense, the burden *shifts* to the plaintiff to rebut it." *Id.* at 633-34 (quoting *Whatley v. Philo,* 817 F.2d 19, 20 (5th Cir.1987)) (internal quotation marks omitted).

Defendants asserted, in their summary judgment motion, that they are entitled to absolute immunity. Accordingly, the burden shifted to Cousin to introduce summary judgment evidence that would permit a reasonable trier of fact to find that, when Jordan allegedly told Rowell to lie, Jordan was functioning as the equivalent of a detective rather than as an advocate preparing for trial.[5]

2.

Citing *Buckley,* Cousin contends that the interrogation of Rowell constitutes investigatory activity, because Jordan was seeking to acquire evidence for later presentation at trial. In *Buckley,* 509 U.S. at 274, 113 S. Ct. 2606, however, the prosecutors sought to develop evidence, in the absence of probable cause, to arrest the suspect or initiate judicial proceedings. Although *Buckley* did not explicitly hold that all

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must establish beyond peradventure *all* of the essential elements of the ... defense to warrant judgment in his favor.' " (quoting *Fontenot v. Upjohn Co.,* 780 F.2d 1190, 1194 (5th Cir.1986)) (omissions in original)).

[5] *See Buckley,* 509 U.S. at 273, 113 S. Ct. 2606 ("We have not retreated, however, from the principle that acts undertaken by a prosecutor in preparing for the initiation of judicial proceedings or for trial, and which occur in the course of his role as an advocate for the State, are entitled to the protections of absolute immunity.").

witness interviews conducted after indictment are advocatory in nature, the Court's reasoning strongly indicates that many, perhaps most, such interviews are likely to be advocatory rather than investigative.

In *Buckley,* the Court focused on the lack of probable cause to arrest the suspect as an indication of the investigative nature of the prosecutors' conduct and noted that "[a] prosecutor neither is nor should consider himself to be, an advocate before he has probable cause to have anyone arrested." *Id.* The necessary implication is that after probable cause has been established, it is more likely that the prosecutor acts as an advocate. Although the Court noted that a determination of probable cause "does not guarantee a prosecutor absolute immunity from liability for all actions taken afterwards," *id.* at 274 n.5, the Court's treatment of the issue demonstrates that the existence of probable cause with respect to a particular suspect is a significant factor to be used in evaluating the advocatory nature of prosecutorial conduct.[6]

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[6] Cousin cites *Moore v. Valder,* 65 F.3d 189, 194 (C.A.D.C.1995), which held that absolute immunity is inapplicable with respect to allegations of witness tampering, because such activity is directed at "the collection of information to be used in a prosecution." *Moore,* however, is inconsistent with *Brandley v. Keeshan,* 64 F.3d 196, 201 (5th Cir.1995), in which we held that the prosecutor retained his absolute immunity even in the face of allegations that he had directed the intimidation of witnesses in an effort to suppress their testimony. Further, the conclusion of the District of Columbia Circuit, in *Moore,* that the collection of information for use in a prosecution is necessarily investigative rather than advocatory conduct demonstrates a much narrower conception of the advocatory role than is justified by *Imbler,* in which the Court explicitly recognized that "[p]reparation, both for the initiation of the criminal process and for a trial, may require the *obtaining,* reviewing, and evaluating of evidence." *Imbler,* 424 U.S. at 431 n. 33, 96 S. Ct. 984 (emphasis added).

"There is a difference between the advocate's role in evaluating evidence and interviewing witnesses as he prepares for trial, on the one hand, and the detective's role in searching for the clues and corroboration that might give him probable cause to recommend that a suspect be arrested, on the other hand." *Id.* at 273, 113 S. Ct. 2606. In this case, therefore, the question of absolute immunity turns on whether Cousin had been identified as a suspect at the time Rowell was interviewed and whether the interview related to testimony to be presented at trial.

In response to the summary judgment motion, Cousin cited Rowell's trial testimony[7] and a declaration from Rowell. Rowell's trial testimony addresses in detail his allegations that prosecutor Jordan and his defense counsel, George Simino, told him to lie about Cousin to avoid a lengthy sentence for armed robbery.

It is uncertain from this evidence whether Cousin had already been charged or arrested at the time of the events alleged. On the one hand, Rowell seemed to aver that Simino and Jordan had given him these instructions after Cousin had already been charged with murder.[8] On the other hand, Rowell testified that when he spoke with two homicide detectives, he

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[7] Rowell's trial testimony included an in-chambers conference that involved the state court, counsel for the parties, and Rowell. The conference appeared to relate primarily to admonitions from the court and from counsel that Rowell not cause a mistrial by testifying about other bad acts that Cousin had committed. Rowell foreshadowed in chambers, however, what he would later assert in court: that the district attorney and Rowell's attorney had instructed him to implicate Cousin falsely.

[8] Rowell testified, "My lawyer came to me with a file, and he said the only [w]ay I can get you lesser time is if I testify against Shareef Cousin on a murder charge."

had already been told to lie.[9] This suggests that Jordan was still functioning as an investigator, and it might permit a reasonable trier of fact to find in Cousin's favor on the immunity issue.

Rowell's declaration, however, eliminates this ambiguity and establishes, without genuine dispute, that Jordan was functioning as an advocate when he allegedly instructed Rowell to lie. Rowell makes it plain that, before he and Jordan ever met, he had already talked to the police, Simino had already advised him that he "needed to give up Shareef on the murder," and Jordan had already talked with Simino. It also demonstrates that, when Jordan met with Rowell, he did so to tell him how he should testify in court and to rehearse his testimony with him. Rowell stated, in relevant part:

> 2. *In my initial statements to the police,* I never said nothing in that statement about no murder because I didn't know anything about it. *Later,* George Simno [*sic*], my lawyer, came to me and told me I was looking at a[sic] 800 years unless I had something for them on Shareef committing the murder. Simno told me, "then you'd get 15 years, otherwise life." I argued about taking the 15 years and being able to tell them nothing since I did not know anything. Simno insisted, "you need to give up Shareef on the murder to get the 15 years." It was clear from this exchange that *he had talked to the prosecutor (who turned out to be Jordan) before he ever brought the issue up with me.*

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[9] The colloquy was as follows: "[Question:] Now, do you also remember telling homicide detectives ... about this conversation you had with Shareef Cousin on March 4, 1995? [Answer:] I only told them what you all told me to say."

> 3. *I met with Roger Jordan two times. Jordan provided me with the questions I would be asked in court and the answers,* always telling me "the main thing is just to emphasize how Shareef was bragging to you all about doing the murder." During the time before trial, I was housed at OPP and would get "attorney visit" callouts. I would be escorted to a visitation room at OPP and find Jordan waiting for me there. *We would practice what I should say there.*
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> 5. Jordan told me to lie about whether I had a deal with the State. But I knew that the reason my sentencing date kept getting moved back was to make sure that it would occur after the trial date, so they could hold that over me. I knew I had a deal, and they knew it too. If I testified for them, I would get 15 years. Jordan tried to get me to lie on a number of points. He was not asking me what I was going to say; he was telling me what to say.

(Emphasis added.)

The record therefore demonstrates that, at the time of Jordan's (and of Simino's) conversations with Rowell, in which Jordan allegedly told Rowell to implicate Cousin falsely in the murder and coached him on how to testify, Jordan was acting as an advocate rather than as an investigator. The interview was intended to secure evidence that would be used in the presentation of the state's case at the pending trial of an already identified suspect, not to identify a suspect or establish

probable cause.[10] Jordan therefore is entitled to absolute immunity with respect to this claim.

B.

Cousin alleges that the prosecution suppressed significant exculpatory evidence in violation of *Brady v. Maryland,* 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). Cousin notes Berry's and Jordan's failure to disclose that Babin, the witness who identified Cousin as the perpetrator, had poor vision and was not wearing her glasses or contacts at the time of the murder and that, as a result, her subsequent identification of Cousin was suspect. Cousin also alleges that the prosecutors failed to disclose information linking other potential suspects to the crime. Although these allegations, if true, would establish prosecutorial misconduct, the suppression of exculpatory evidence is shielded by absolute immunity.[11]

Cousin concedes that absolute immunity generally applies to *Brady* violations, but he notes that prosecutors are not shielded from liability for conduct beyond the scope of their jurisdiction; he contends that, in cases of drastic and systematic departure from the proper exercise of prosecutorial power, prosecutors should be deemed to have acted without jurisdiction. In effect, Cousin argues for an egregiousness exception to the doctrine of prosecutorial immunity.

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[10] *See Hill v. City of New York,* 45 F.3d 653, 662-63 (2d Cir.1995) (holding that the existence of probable cause determines whether fabrication is investigatory or advocatory); *see also Milstein v. Cooley,* 257 F.3d 1004, 1011 (9th Cir.2001) (holding fabrication not protected because no probable cause).

[11] *See Henzel v. Gerstein,* 608 F.2d 654, 657 (5th Cir.1979); *see also Reid v. New Hampshire,* 56 F.3d 332, 336 (1st Cir.1995); *Robinson v. Volkswagenwerk AG,* 940 F.2d 1369, 1373 n. 4 (10th Cir.1991.

For purposes of immunity determinations, however, the presence or absence of jurisdiction is determined with reference to whether the challenged activity falls within the category of conduct in which a prosecutor is generally authorized to engage, rather than with reference to the wrongful nature or excessiveness of the conduct.[12] Wilful or malicious prosecutorial misconduct is egregious by definition, yet prosecutors are absolutely immune from liability for such conduct if it occurs in the exercise of their advocatory function. *See Imbler,* 424 U.S. at 430, 96 S. Ct. 984.

Absent immunity, the specter of litigation could undermine prosecutors' ability to exercise their independent judgment with respect to the initiation and conduct of criminal proceedings. *See id.* at 422-28, 96 S. Ct. 984. In essence, the existence of the doctrine of absolute prosecutorial immunity represents a determination that the need for "vigorous and fearless performance of the prosecutor's duty," *id.* at 427, 96 S. Ct. 984, justifies its regrettable but necessary cost, namely, that it may sometimes bar the courthouse door to potentially meritorious claims. We decline to adopt an exception to the doctrine of prosecutorial immunity that upsets that balance.

C.

Cousin also challenges Berry's and Jordan's allegedly unlawful use of subpoenas to interrogate several potential witnesses. Even if these individuals were unlawfully forced to discuss the case with the prosecution, however, Cousin, at most, has alleged a violation of their constitutional rights, not his own. Although Cousin's constitutional rights may have

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[12] *See Kerr v. Lyford,* 171 F.3d 330, 337 (5th Cir.1999) (citing *Stump v. Sparkman,* 435 U.S. 349, 356-57, 98 S. Ct. 1099, 55 L. Ed. 2d 331 (1978).

been violated by Berry's and Jordan's subsequent decision to suppress exculpatory evidence obtained through the use of these subpoenas, the suppression of exculpatory evidence is shielded by absolute immunity, as we have discussed.[13]

D.

Cousin's final claim of prosecutorial misconduct relates to the alleged detention of several defense witnesses. Cousin contends that during trial, Barry and Jordan, without informing the defense, either directly or through intermediaries, instructed several defense witnesses to proceed to the district attorney's office and remain there for the duration of the trial. Cousin further avers that, as a result of such interference, he was unable to locate those witnesses and present their testimony, depriving him of the right to call witness on his own behalf, a right that has "long been recognized as essential to due process." *Chambers v. Mississippi,* 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973).

The district court held that this conduct, occurring as it did during the trial, was prosecutorial in nature and therefore shielded by absolute immunity. Cousin contends the court erred and that, despite the pendency of a judicial proceeding, the relocation of the witnesses was administrative action to which absolute prosecutorial immunity does not apply.

Cousin correctly notes that, because the test for absolute immunity is functional rather than temporal, the mere fact that prosecutors engage in certain conduct during trial should not render them immune. What Cousin fails to acknowledge, however, is that the timing of events, while not determinative,

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[13] *See Henzel,* 608 F.2d at 657; *see also Reid,* 56 F.3d at 336; *Robinson,* 940 F.2d at 1373 n.4.

can be highly relevant to the inquiry into function.[14] The pendency of a judicial proceeding is logically related to the determination whether a prosecutor's "activities [are] intimately associated with the judicial phase of the criminal process, and thus [are] functions to which the reasons for absolute immunity apply with full force." *Imbler,* 424 U.S. at 430, 96 S. Ct. 984.[15]

The question of absolute immunity therefore turns on whether, given the pending criminal trial, Berry and Jordan undertook the detention of these witnesses pursuant to their role as advocates. Because their conduct was directly related to the trial process, was entered into in the context of an ongoing trial, and was designed to secure a conviction, it cannot be characterized as anything other than advocatory. Therefore, the detention of witnesses to prevent them from testifying in criminal proceedings, while unlawful and improper, is nonetheless shielded by absolute immunity.[16]

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[14] *See Buckley,* 509 U.S. at 274, 113 S. Ct. 2606 (considering stage of criminal justice process in determining functional characterization of the conduct); *see also Carter v. Burch,* 34 F.3d 257, 263 (4th Cir.1994) (considering pendency of judicial proceedings in making immunity determination).

[15] *See Hill,* 45 F.3d at 662 (immunity applicable because conduct occurred "after the prosecutorial phase of the case had begun"); *Carter,* 34 F.3d at 263 (holding pendency of post-conviction judicial proceedings relevant to immunity determination); *see also Milstein,* 257 F.3d at 101 (holding conduct unprotected because it occurred before empanelment of grand jury or determination of probable cause).

[16] *See House v. Belford,* 956 F.2d 711, 721-22 (7th Cir.1992) (finding prosecutor entitled to absolute immunity where he denied that he had instructed deputy to bar courtroom to defendant's family and potential witnesses); *cf. Brandley,* 64 F.3d at 201 (holding that prosecutor retained absolute immunity despite allegations of witness intimidation in attempt to suppress testimony).

This result comports with our treatment of other improper attempts to control witness testimony and the presentation of evidence at trial.[17] Further, the contrary rule would have the anomalous result of extending absolute immunity to the prosecutor who silences a witness through coercion or intimidation, *Brandley,* 64 F.3d at 201, but denying it to the prosecutor who achieves the same result through deceit.

IV.

Cousin challenges the summary judgment for Connick that was based on qualified immunity. We review a summary judgment *de novo. Green v. CBS Broadcasting, Inc.,* 286 F.3d 281, 283 (5th Cir.), *cert. denied,* – U.S. –, 123 S. Ct. 132, 154 L. Ed. 2d 148 (2002).

Even when viewed in the light most favorable to Cousin, the evidence does not raise a genuine issue of material fact. To succeed on his claim of failure to train or supervise, Cousin must demonstrate that "1) the [defendant] failed to train or supervise the officers involved; 2) there is a causal connection between the alleged failure to supervise or train and the alleged violation of the plaintiff's rights; and 3) the failure to train or supervise constituted deliberate indifference to the plaintiff's constitutional rights." *Thompson v. Upshur County,* 245 F.3d 447, 459 (5th Cir. 2001). To satisfy the deliberate indifference prong, a plaintiff usually must demonstrate a pattern of violations and that the inadequacy of the training is "obvious and obviously likely to result in a constitutional violation." *Id.*

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[17] *Brandley,* 64 F.3d at 201 (witness intimidation); *Henzel,* 608 F.2d at 657 (suppression of exculpatory evidence and introduction of perjured testimony).

Cousin's evidence is insufficient to create a genuine issue of material fact as to whether Connick's alleged failure to sufficiently enforce the office's *Brady* policy constituted deliberate indifference to the violation of constitutional rights. As evidence of a pattern of constitutional violations, Cousin relies primarily on cases in which courts have found that prosecutors under Connick's supervision failed to disclose exculpatory evidence as required by *Brady*. The district court noted that Connick's office handled tens of thousands of criminal cases over the relevant time period, and we agree with the court's conclusion that citation to a small number of cases, out of thousands handled over twenty-five years, does not create a triable issue of fact with respect to Connick's deliberate indifference to violations of *Brady* rights.[18]

In any event, Cousin also failed to demonstrate that the training or supervision obviously was inadequate and plainly would result in violations of constitutional rights. As Cousin concedes, Connick's policy and training program was adequate. Therefore, it is his failure to impose sanctions on prosecutors responsible for *Brady* violations that must be shown to render his supervision inadequate.

Connick's enforcement of the policy was not patently inadequate or likely to result in constitutional violations. Where prosecutors commit *Brady* violations, convictions may be overturned. That could be a sufficient deterrent, such that

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[18] On this point, Cousin also points to statements by Connick and other attorneys with respect to *Brady* rights, an open letter from a judge to the office of the district attorney expressing concern over its discovery practices, and evidence that Connick promoted Jordan despite Jordan's prior *Brady* violations. Even taken together, these pieces of evidence do not create a genuine issue with respect to a pattern of *Brady* violations sufficient to establish deliberate indifference.

the imposition of additional sanctions by Connick is unnecessary.

Further, prosecutors exercise independent judgment in trying a case, and they have the legal and ethical obligation to comply with *Brady*. It is not apparent that these prosecutors, who, Cousin concedes, are adequately trained with respect to *Brady* requirements, are so likely to violate their individual obligations that the threat of additional sanctions is required.

AFFIRMED.

Appendix B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

SHAREEF COUSIN	CIVIL ACTION
VERSUS	NO: 00-0069
ANTHONY SMALL, ET AL.	SECTION: "R"(2)

ORDER AND REASONS

Before the Court is a motion by defendants Harry F. Connick, Roger W. Jordan, Jr., and C. Byron Berry, Jr. to dismiss plaintiff Shareef Cousin's claims pursuant to Federal Rule of Civil Procedure 12(b)(6) or, alternatively, for summary judgment pursuant to Rule 56(c). For the following reasons, the Court dismisses plaintiff's claims against defendants under Rule 12(b)(6) or Rule 56 of the Federal Rules of Civil Procedure.

I. Background

On March 2, 1995, Michael Gerardi was shot in the head as he and his date left a restaurant in the French Quarter in New Orleans, Louisiana. Mr. Gerardi died of his injuries.

After the New Orleans Police Department arrested plaintiff Shareef Cousin for the murder of Michael Gerardi, Assistant District Attorney Greg Kennedy screened the case. He recommended presenting it to the Grand Jury, and the District Attorney's "Charge Committee" accepted the recommendation.

Kennedy then presented the case to the Grand Jury, which returned an indictment of first degree murder against Shareef Cousin.

The prosecution of Shareef Cousin was assigned to Assistant District Attorney Roger Jordan. Jordan reviewed the police report and evidence, handled the pre-trial discovery and motions, summoned and interviewed witnesses, selected the witnesses and evidence to present at trial, and generally prepared the case. Assistant District Attorney Byron Berry assisted Jordan.

A jury sentenced plaintiff Shareef Cousin to death for the murder of Michael Gerardi. *See State v. Cousin*, 710 So. 2d 1065, 1066 (La. 1998). Plaintiff appealed, and the Louisiana Supreme Court overturned the conviction on April 14, 1998, remanding the case for a new trial. *See id.* at 1074. The Louisiana Supreme Court found "clear violations of defendant's right to a fair trial." *Id.* at 1073. Specifically, the prosecutor "improperly urged the jury to accept the substance of . . . hearsay statements and to use the statements to convict defendant." *Id.* In two footnotes, the Supreme Court also admonished the prosecutors for failing to disclose exculpatory witness statements to the defense. *See id.* at 1066 n.2, 1073 n.8. On January 8, 1999, the eve of the second trial, the district attorney's office dismissed the murder charges against Shareef Cousin.

On January 7, 2000, plaintiff filed a complaint in the Eastern District of Louisiana, seeking relief under 42 U.S.C. §§ 1983, 1985, 1986, and 1988 as well as state tort law. Plaintiff alleges a multitude of prosecutorial and law enforcement abuses: fabrication of evidence, unlawful search and seizure, false arrest, false imprisonment, interference with and coercion

of witnesses, presentation of perjured testimony, suppression of exculpatory evidence, conspiracy, malicious prosecution, defamation, intentional infliction of emotional distress, and failure to train and supervise subordinates. Plaintiff seeks compensatory and punitive damages, as well as declaratory and injunctive relief.

Defendants Connick, Jordan, and Berry now move to dismiss plaintiff's claims or, alternatively, for summary judgment. They argue that plaintiff's claims are prescribed, assert absolute and qualified immunity, and contend that no policy, custom, or practice of the office of the District Attorney in Orleans Parish violated plaintiff's civil rights.

II. Discussion

A. Legal Standards

1. Rule 12(b)(6) Standard

In a motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6), the Court must accept all well-pleaded facts as true and view the facts in the light most favorable to the plaintiff. *See Baker v. Putnal*, 75 F.3d 190, 196 (5th Cir. 1996); *American Waste & Pollution Control Co. v. Browning-Ferris, Inc.*, 949 F.2d 1384, 1386 (5th Cir. 1991). Dismissal is warranted if "it appears certain that the plaintiff cannot prove any set of facts in support of his claim that would entitle him to relief." *Piotrowski v. City of Houston*, 51 F.3d 512, 514 (5th Cir. 1995) (quoting *Leffall v. Dallas Indep. Sch. Dist.*, 28 F.3d 521, 524 (5th Cir. 1994)). In deciding whether dismissal is warranted, the Court will not accept conclusory allegations in the complaint as true. *See Kaiser Aluminum & Chem. Sales, Inc. v. Avondale Shipyards,*

Inc., 677 F.2d 1045, 1050 (5th Cir. 1982).

When deciding a Rule 12(b)(6) motion, the Court will not consider matters outside the pleadings, except those matters of which the Court takes judicial notice. *See* Fed. R. Civ. P. 12(b); Fed. R. Evid. 201. *See also Cinel v. Connick*, 15 F.3d 1338, 1343 n.6 (5th Cir. 1994) ("In deciding a 12(b)(6) motion to dismiss, a court may permissibly refer to matters of public record."); In re *Ford Motor Co. Bronco II Prods. Liab. Litig.*, 909 F. Supp. 400, 403 (E.D. La. 1995) ("[T]he Court may take judicial notice of matters of public record."); *Chadwick v. Layrisson*, 1999 WL 717628, at *2 (E.D. La. Sept. 13, 1999) (same).

2. Summary Judgment Standard

Summary judgment is appropriate when there are no genuine issues as to any material facts, and the moving party is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(C). *See also Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 2552 (1986). Accordingly, a court must be satisfied that no reasonable trier of fact could find for the nonmoving party. In other words, "if the evidentiary material of record were reduced to admissible evidence in court, it would be insufficient to permit the nonmoving party to carry its burden." *Beck v. Texas State Bd. of Dental Exam'rs*, 204 F.3d 629, 633 (5th Cir. 2000).

Initially, the moving party bears the burden of establishing that there are no genuine issues of material fact. If the dispositive issue is one for which the nonmoving party will bear the burden of proof at trial, the moving party may satisfy its burden by merely pointing out that the evidence in the record contains insufficient proof concerning an essential

element of the nonmoving party's claim. *See Celotex*, 477 U.S. at 325, 106 S. Ct. at 2554. The burden then shifts to the nonmoving party, who must, by submitting or referring to evidence, set out specific facts showing that a genuine issue exists. *See Celotex*, 477 U.S. at 324, 106 S. Ct. at 2553. *See also Forsyth v. Barr*, 19 F.3d 1527, 1537 (5th Cir. 1994). Summary judgment is mandated if the nonmovant fails to make a showing sufficient to establish the existence of an element essential on which it bears the burden of proof at trial. *See Celotex*, 477 U.S. at 322, 106 S. Ct. at 2552. The nonmovant may not rest upon the pleadings but must identify specific facts that establish a genuine issue exists for trial. *See id.* at 325, 106 S. Ct. at 2553-54; *Rushing v. Kansas City S. Ry. Co.*, 185 F.3d 496, 505 (5th Cir. 1999).

B. Federal Claims

Plaintiff asserts claims for fabrication of evidence, unlawful search and seizure, false arrest, false imprisonment, suppression of exculpatory evidence, conspiracy, malicious prosecution, defamation, and failure to train and supervise subordinates under 42 U.S.C. §§ 1983, 1985, 1986, and 1988.

1. Absolute Immunity

Defendants Jordan and Berry argue that the doctrine of absolute immunity precludes plaintiff's § 1983 claims against them in their individual capacities because their actions were taken in furtherance of their prosecutorial duties. Although § 1983 does not, on its face, allow for a defense of official immunity, the United States Supreme Court held in *Tenney v. Brandhove*, 341 U.S. 367, 376, 71 S. Ct. 783, 788 (1951), that Congress did not intend § 1983 to abrogate immunities "well grounded in history and reason." Since *Tenney*, the Supreme

Court has recognized two kinds of immunity–absolute and qualified.

The Supreme Court has been "quite sparing" in its recognition of absolute immunity in § 1983 actions, and it has adopted a "functional approach" to determine whether a particular defendant merits absolute immunity. *Kalina v. Fletcher*, 522 U.S. 118, 127, 118 S. Ct. 502, 508 (1997); *Buckley v. Fitzsimmons*, 509 U.S. 259, 269, 113 S. Ct. 2606, 2613 (1993). Consistent with this functional approach, prosecutors enjoy absolute immunity only for those activities "intimately associated with the judicial phase of the criminal process." *Imbler v. Pachtman*, 424 U.S. 409, 430, 96 S. Ct. 984, 995 (1976). *See also Kerr v. Lyford*, 171 F.3d 330, 336 (5th Cir. 1999). Accordingly, "in initiating and presenting the State's case, the prosecutor is immune from a civil suit for damages under § 1983." *Imbler*, 424 U.S. at 431, 96 S. Ct. at 995. Absolute immunity does not shield a prosecutor's administrative duties or those investigatory functions that do not relate to his preparation for the initiation of a prosecution or for judicial proceedings. *Buckley*, 509 U.S. at 273, 113 S. Ct. at 2615 ("We have not retreated, however, from the principle that acts undertaken by a prosecutor in preparing for the initiation of judicial proceedings or for trial, and which occur in the course of his role as an advocate for the State, are entitled to the protections of absolute immunity."). An official seeking absolute immunity bears the burden of showing that such immunity is justified. *See Burns v. Reed*, 500 U.S. 478, 486, 111 S. Ct. 1934, 1939 (1991).

a. Fabrication of Evidence, Suppression of Exculpatory Evidence, and Malicious Prosecution

Plaintiff challenges Jordan's and Berry's assertion that all of their actions were in furtherance of their prosecutorial duties. He argues that absolute immunity does not shield Jordan and Berry because they (1) forced witnesses to talk against their will, (2) suppressed exculpatory evidence, (3) kidnaped witnesses, (4) illegally investigated witnesses, and (5) had a racial motive for pursuing the death penalty.

The Court rejects plaintiff's arguments and finds that absolute immunity shields Jordan and Berry from plaintiff's § 1983 claims for fabrication of evidence, suppression of exculpatory evidence, and malicious prosecution. First, merely asserting that defendants coerced statements from witnesses does not present a violation of *plaintiff's* constitutional rights. Plaintiff's assertion that these interviews produced exculpatory evidence that defendants' suppressed is unavailing, because it is well settled that a prosecutor cannot be held personally liable for the knowing suppression of exculpatory evidence. *See*, e.g., *Imbler*, 424 U.S. at 430, 96 S. Ct. at 995; *Reid v. New Hampshire*, 56 F.3d 332, 336 (1st Cir. 1995) (citing cases); *Carter v. Burch*, 34 F.3d 257, 262-63 (4th Cir. 1994); *Henzel v. Gersteih*, 608 F.2d 654, 657 (5th Cir. 1979). Second, although plaintiff alleges that the prosecutors removed certain witnesses from the state courthouse to the district attorney's office, this occurred *during* the trial. Jordan and Berry are absolutely immune for their actions during the presentation of the State's case. Third, plaintiff challenges the witness interviews conducted by defendants seven months after his indictment and a few weeks before his originally scheduled trial date in October 1995. (Defs'., Mem. Supp. Mot. Dismiss, Ex.

1 at 2.) This is not the type of investigatory activity that falls outside a prosecutor's role as advocate. A prosecutor's evaluation of evidence assembled by police and preparation of it for presentation at trial after a decision to indict has been made are covered by absolute immunity. *See Buckley*, 509 U.S. at 272-73, 113 S. Ct. at 2615. Indeed, Jordan's testimony, which plaintiff relies upon, indicates that he interviewed witnesses identified by the police or by plaintiff's trial counsel as alibi witnesses in the criminal proceeding. (Pl.'s Supplemental Reply Defs.' Mot. Dismiss, Ex. J at 191-93.) This activity falls within absolute immunity. Even though plaintiff alleges that defendants coerced or conspired with some of these witnesses to present false evidence at trial, however distasteful, the presentation of false evidence to the trial court necessarily implicates an assistant district attorney's prosecutorial function and, accordingly, is shielded by absolute immunity. *See*, e.g., *Imbler*, 424 U.S. at 430-31, 96 S. Ct. at 995; *Carter*, 34 F.3d at 263 ("[T]he presentation of false testimony in court is a charge for which the prosecutor is afforded absolute immunity."); *Dory v. Ryan*, 25 F.3d 81, 83 (2d Cir. 1994). Fourth, absolute immunity analysis is objective. The focus is on the function performed by the district attorney; motive is irrelevant. *See Groom v. Fickes*, 966 F. Supp. 1466, 1472 (S.D. Tex.), *aff'd*, 129 F.3d 606 (5th Cir. 1997) (prosecutor "enjoys absolute immunity even if he maliciously singled out the plaintiff for prosecution"). Therefore, the alleged racial animus is irrelevant.

b. Conspiracy

As Jordan and Berry are absolutely immune from plaintiff's § 1983 claims for fabrication of evidence, suppression of exculpatory evidence, and malicious prosecution, the Court further finds that "plaintiff derives no

benefit from alleging a conspiracy" predicated on those immune actions and dismisses those conspiracy claims. *Pinaud v. County of Suffolk*, 52 F.3d 1139, 1148 (2d Cir. 1995) (citing cases). *See also Dory*, 25 F.3d at 83 ("The fact that such a conspiracy is certainly not something that is *properly* within the role of a prosecutor is immaterial, because '[t]he immunity attached to his function, not to the manner in which he performed it.'" (quoting *Barrett v. United States*, 798 F.2d 565, 573 (2d Cir. 1986) (emphasis in original)); *Smith v. City of New Orleans, Dep't of Police*, 1996 WL 39424, at *3 (E.D. La. Jan. 30, 1996) ("The Court has already determined that the underlying acts were protected by absolute immunity; mere allegations that defendants performed those acts in the course of a conspiracy will not be sufficient to avoid absolute immunity."). All of plaintiff's alleged conspiracies involving Jordan and Berry–conspiracies to fabricate evidence, to suppress exculpatory evidence, and to commit perjury–arose *after* plaintiff had been arrested and indicted by the grand jury and *during* the preparation for trial. (Compl. at 5, 32-34, 38, 45, 51, 53, 64, 67.)

c. Search and seizure

Defendants argue that they are absolutely immune from plaintiff's claims for illegal search and seizure. While plaintiff alleges that a New Orleans police detective fabricated a false basis for the arrest warrant and the search of plaintiff's home, he does not allege that Connick, Jordan, or Berry were involved in that fabrication. Greg Kennedy, the assistant district attorney who screened the case against plaintiff and presented it to the grand jury, has been dismissed, on plaintiff's motion, as a defendant. (Pl.'s Mot. Dismiss Greg Kennedy at 1.) Jordan and Berry were assigned to plaintiff's prosecution *after* the grand jury indicted him. (Defs.' Mem. Supp. Mot. Dismiss, Exs. 3 at

1-2, 4 at 1-2.)

Even though Jordan and Berry had no involvement in the search and seizure, plaintiff claims that they had to have learned that the warrant application was false because they had "records" to this effect. Plaintiff also claims that defendants failed to expose the "lies" and took investigative steps outside their roles as prosecutors to fabricate a stronger case. (Compl. at 19, 23, 65.) Given the stage of the proceedings at which Jordan and Berry became involved in plaintiff's prosecution, these claims are not claims for illegal search and seizure, but instead fall under plaintiff's complaints that Jordan and Berry suppressed exculpatory evidence, fabricated evidence, and maliciously prosecuted him. As the Court has already explained, Jordan and Berry are absolutely immune for the suppression of exculpatory evidence, fabrication of evidence, and malicious prosecution.

d. False Arrest and False Imprisonment

The Court further dismisses plaintiff's claims for false arrest and false imprisonment against Jordan and Berry. The predicate for these claims is that Jordan and Berry suppressed exculpatory evidence that the basis for plaintiff's arrest was "false or insufficiently reliable." (Compl. at 68.) As Jordan and Berry did not become involved in plaintiff's prosecution until *after* his arrest and incarceration, these claims are not claims for false arrest and false imprisonment. Rather, plaintiff presents a claim for the suppression of exculpatory evidence, from which, as the Court already explained, Jordan and Berry are absolutely immune.

2. Qualified Immunity

Plaintiff claims that Connick, in his individual capacity, failed to train and supervise his subordinates adequately to prevent them from suppressing exculpatory evidence. (Compl. at 77.) Connick argues that the doctrine of qualified immunity shields him from this claim.

Qualified immunity shields government officials from civil liability for damages based upon the performance of discretionary functions if the acts were objectively reasonable in light of then clearly established law. *See Buckley*, 509 U.S. at 268, 113 S. Ct. at 2613; *Thompson v. Upshur County*, 245 F.3d 447, 456 (5th Cir. 2001). Once a § 1983 defendant pleads qualified immunity and shows that he is a governmental official whose position involves the exercise of discretion, the plaintiff bears the burden of rebutting this defense by establishing that the official's wrongful conduct violated clearly established law. *Thompson*, 245 F.3d at 456-57, 460 (quoting *Pierce v. Smith*, 117 F.3d 866, 71 (5th Cir. 1977)).

The first step in the qualified immunity analysis is to determine whether the plaintiff has alleged the violation of a constitutional right. *Id.* at 457. If the plaintiff alleges a constitutional violation, the Court must assess whether the defendant's conduct was objectively reasonable in light of clearly established law at the time that the challenged conduct occurred. *Id.* "Clearly established" means the "contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S. Ct. 3034, 3039 (1987). A defendant's acts are objectively reasonable unless *all* reasonable officials in those circumstances would have then known that the defendant's conduct violated the Constitution

or federal statute as alleged by plaintiff. *Thompson*, 245 F.3d at 457 (citing cases). In this determination of objective reasonableness, the defendant's subjective state of mind is irrelevant. *Id.* (citing cases). Furthermore, even officials who reasonably, but mistakenly, commit a constitutional violation are entitled to immunity. *Glenn v. City of Tyler*, 242 F.3d 307, 312 (5th Cir. 2001).

Here, plaintiff alleges violations of his clearly established constitutional rights. However, as it is undisputed that Connick was not personally involved in the acts that allegedly deprived plaintiff of his constitutional rights, the issue is whether his policies were objectively reasonable in light of the then clearly established law.

Under § 1983, "[s]upervisory officials are not liable for the actions of subordinates on any theory of vicarious liability." *Thompson*, 245 F.3d at 459 (quoting *Thompkins v. Belt*, 828 F.2d 298, 303 (5th Cir. 1987)). A supervisor is liable if he failed to train or supervise the assistant district attorneys involved, there is a causal connection between the alleged failure to supervise or train and the alleged violation of plaintiff's rights, and the failure to train or supervise constituted deliberate indifference to the plaintiff's constitutional rights. *See id.* (citing cases). For a lack of training or supervision to constitute deliberate indifference, plaintiff must demonstrate at least a pattern of similar violations. *See id.* (citing *Snyder v. Trepagnier*, 142 F.3d 791, 798 (5th Cir. 1998)). "Furthermore, the inadequacy of training must be obvious and obviously likely to result in a constitutional violation." *Id.* (citing cases).

As a threshold matter, plaintiff admits that Connick's *Brady* policy is adequate. (Pl.'s Supplemental Reply Defs.'

Mot. Dismiss at 22.) He complains, however, that his injuries are a consequence of Connick's failure to enforce that policy. To substantiate his allegation that Connick's failure to train or supervise his staff constitutes deliberate indifference, plaintiff cites seven opinions over the past twenty-five years in which courts found *Brady* violations sufficient to reverse convictions and a handful of other cases where Brady problems were not sufficient to warrant reversing convictions. (Pl.'s Mem. Reply Mot. Dismiss at 20 n.26, 20 n.27.) None of these cases, however, found a lack of a *Brady* policy or a failure to train and supervise.

Evidence of Connick's policy and training program is substantiated in eight affidavits, which explain section 5.25 of the district attorney's policy manual, the training classes (which qualify for Continuing Legal Education credits), and the regular circulation of judicial opinions and professional publications. (*Id.*, Exs. 2 Kennedy affidavit) at 3-4, 3 (Berry affidavit) at 2-3, 4 (Jordan affidavit) at 3-4, 5 (Connick affidavit at 2-4), 6 (McElroy affidavit) at 2-7, 7 (Solino affidavit) at 2, 8 (McSmith affidavit) at 2-3, 9 (Buras affidavit) at 2-4.) The only evidence to the contrary that plaintiff offers is an affidavit by Bruce G. Whittaker, whom Connick reported to the state bar for prosecutorial misconduct. Mr. Wittaker describes three cases in which there were delays in obtaining DNA tests. (Pl.'s Supplemental Reply Defs.' Mot. Dismiss, Ex. L at 1-2.) He does not aver, however, that those delays are attributable to any deficiencies in Connick's training and supervision. Mr. Wittaker also states: "From my lengthy experience in and around Tulane and Broad, Mr. Connick's office has a reputation for not always disclosing in a timely manner exculpatory evidence as required by law." (*Id.*, Ex. L at 3.) Mere reputation, however, is insufficient to raise a question of fact or to assign Connick liability for failure to train and

supervise. Plaintiff makes serious allegations, which the Court takes seriously. Absent the necessary evidence, however, plaintiff fails to satisfy his burden of showing that a genuine issue of fact exists.

Furthermore, the Court finds that plaintiff has not raised a triable issue as to whether there is a pattern of *Brady* violations. Taking judicial notice of the *tens of thousands* of cases handled by the Office of the District Attorney in Orleans Parish during Connick's tenure since April 1, 1974, the Court finds that the cases cited by plaintiff span twenty-five years and are isolated, fact-specific incidents that do not constitute a pattern evidencing Connick's deliberate indifference. (Defs.' Mem. Supp Mot. Dismiss, Exs. 5 at 1-2, 5 at 4-5, 8 at 2-3.) While no constitutional violation is insignificant, the issue here is whether the violations occurred with such frequency that Connick could be deemed to be deliberately indifferent. At the very best, plaintiff has shown that *Brady* problems occurred in fewer than one out of a thousand cases. Further, plaintiff fails to provide the Court a benchmark to determine that his showing is significant enough to amount to a pattern. *Cf. Thompson*, 245 F.3d at 463. Accordingly, in the absence of a pattern, Connick is not liable for any failure to train or supervise.

3. Official Capacity

The Court further dismisses plaintiff's claims against Con-nick, Berry, and Jordan in their official capacities. Official-capacity suits are tantamount to a suit against the public entity. *See Kentucky v. Graham*, 473 U.S. 159, 165-66, 105 S. Ct. 3099, 3105 (1985). In order to hold a public entity liable under § 1983 for the misconduct of one of its employees, "a plaintiff must initially allege that an official policy or custom 'was a cause in fact of the deprivation of rights inflicted.'"

Spiller v. City of Texas City, Police Dep't, 130 F.3d 162, 167 (5th Cir. 1997) (quoting *Leffall v. Dallas Indep. Sch. Dist.*, 28 F.3d 521, 525 (5th Cir. 1994)).

A public entity cannot be held liable under § 1983 on a theory of respondant superior. *Kentucky*, 473 U.S. at 168, 105 S. Ct. at 3016; *Monell v. Department of Soc. Servs. of the City of New York*, 436 U.S. 658, 691, 98 S. Ct. 2018, 2036 (1978). "To satisfy the cause in fact requirement, a plaintiff must allege that 'the custom or policy served as the moving force behind the [constitutional] violation' at issue, or that [his] injuries resulted from the execution of the official policy or custom." *Spiller*, 130 F.3d at 167 (citations omitted). *See also Board of County Comm'rs of Bryan County v. Brown*, 520 U.S. 397, 403, 117 S. Ct. 1382, 1388 (1997). "The description of a policy or custom and its relationship to the underlying constitutional violation, moreover, cannot be conclusory; it must contain specific facts." *Id.*

Plaintiff alleges that the policies (or lack of enforcement thereof) of the Office of the District Attorney are the cause in fact of his injuries. As the Court already explained, plaintiff fails to present any evidence of a policy or custom to suppress exculpatory evidence. In the absence of that evidence, plaintiff fails to satisfy his burden of showing a genuine issue of fact exists. The Court therefore dismisses plaintiff's claims against defendants in their official capacities.

4. Defamation

Plaintiff asserts a § 1983 defamation claim, alleging that Connick defamed him when Connick commented on August 5,

1996 that plaintiff's conviction "was based on fact."[1] (Compl. at 60.) Connick argues that defamation is not a constitutional tort and is not actionable under § 1983. Plaintiff did not respond to this argument.

Defamation, in itself, is not a constitutional tort. *See Kerr*, 171 F.3d at 339. A false accusation of wrongdoing, however, "can be a link in a chain showing a deprivation of liberty or property without due process." *Doe v. Louisiana*, 2 F.3d 1412, 1421 (5th Cir. 1993) (King, J., concurring) (quoting *Mahoney v. Kesert*, 976 F.2d 1054, 1060 (7th Cir. 1992)). *See also San Jacinto Sav. & Loan v. Kacal*, 928 F.2d 697, 700-01 (5th Cir. 1991) (§ 1983 claimant must show stigma plus infringement of some other interest). In his opposition briefs, plaintiff does not show how this single statement by Connick satisfies the stigma plus rationale. He does not explain how the statement was a link in the deprivation of his liberty, as he had been convicted and incarcerated for several months when Connick made the statement. Indeed, the Court has found no authority validating a § 1983 claim in this context. The Court accordingly dismisses plaintiff's § 1983 claim for defamation.

C. State Claims

Plaintiff also asserts state tort claims for fabrication of evidence, unlawful search and seizure, false arrest, false imprisonment, interference with and coercion of witnesses, presentation of perjured testimony, suppression of exculpatory

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[1] The Court previously ruled that the only defamatory comment by Connick, Jordan, or Berry that was sufficiently alleged in plaintiff's complaint was an August 5, 1996 comment by Connick that plaintiff's conviction "was based on fact." *See Cousin v. Small*, 2000 WL 1100384, at *3 (E.D. La. Aug. 4, 2000). *See also* Compl. at 60. Plaintiff has not amended his complaint to specify any additional defamatory comments.

evidence, conspiracy, malicious prosecution, defamation, intentional infliction of emotional distress, and failure to train and supervise subordinates. Defendants argue that Louisiana law does not recognize a cause of action against a district attorney arising out a criminal prosecution outside of a claim for malicious prosecution and that the doctrine of absolute immunity shields them from plaintiff's claim for malicious prosecution.

In 1996, the Louisiana Supreme Court expressly adopted the United States Supreme Court's functional analysis set forth in *Imbler* to determine whether a prosecutor is entitled to absolute immunity. *Knapper v. Connick*, 681 So. 2d 944, 950-51 (La. 1996) (citing cases). As the Court already explained, a district attorney and his assistants are absolutely immune from civil liability for actions taken within the scope of their prosecutorial duties. *See id.*; *Sinclair v. Louisiana*, 769 So. 2d 1270, 1271 (La. App. 1st Cir. 2000). An official seeking absolute immunity, however, bears the burden of showing that such immunity is justified. *See Burns*, 500 U.S. at 486, 111 S. Ct. at 1939.

Despite defendants' assertion to the contrary, Louisiana law recognizes causes of action other than malicious prosecution against prosecutors. *See, e.g., West v. Foti*, 654 So. 2d 834, 836 (La. App. 4th Cir. 1995) (district attorney may be subject to suit for false arrest and false imprisonment). Although defendants only argue that they are absolutely immune from plaintiff's state claims for malicious prosecution, the Court's analysis of defendants' absolute immunity under federal law applies to plaintiff's state law claims. Accordingly, the Court extends that analysis and dismisses plaintiff's state law claims for fabrication of evidence, unlawful search and seizure, false arrest, false imprisonment, interference with and

coercion of witnesses, presentation of perjured testimony, suppression of exculpatory evidence, conspiracy, and malicious prosecution. The Court also dismisses plaintiff's claims for intentional infliction of emotional distress because it is predicated on acts shielded by absolute immunity.

The Court further dismisses plaintiff's claims for failure to train and supervise as well as his claims against defendants in their official capacities. As the Court already explained, plaintiff fails to provide the requisite evidence to create an issue of fact as to these claims.

Finally, the Court dismisses plaintiff's state defamation claim. Plaintiff fails to cite any cases in which a state prosecutor has been held civilly liable for defamation, and he has not briefed the validity of this claim. Further, pretermitting questions of possible privileges, any Louisiana defamation claim requires malice. *See Gugliuzza v. K.C.M.C., Inc.*, 606 So. 2d 790, 791 (5th Cir. 1992); *Cangelosi v. Schwegmann Bros. Giant Super Mkts.*, 390 So. 2d 196, 198 (5th Cir. 1980). There are no allegations of actual malice in the complaint, and malice can not be implied from the circumstances. Indeed, as to the challenged statement in issue, plaintiff does not even allege that Connick knew the statement was false when he made it.

III. Conclusion

For the foregoing reasons, the Court dismisses all of plaintiff's claims against defendants Connick, Jordan, and Berry.

New Orleans, Louisiana, this 4th day of June, 2001.

/s/ Sarah S. Vance
SARAH S. VANCE
UNITED STATES DISTRICT JUDGE

Appendix C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

SHAREEF COUSIN,	CIVIL ACTION
VERSUS	No. 00-0069
ANTHONY SMALL, et al.	

ORDER AND REASONS

Before this Court is plaintiff's motion for determination and entry of final judgment pursuant to Federal Rule of Civil Procedure 54(b). For the following reasons the Court grants plaintiff's motion.

I. Background

On June 4, 2001, the Court issued an order dismissing all claims against Harry F. Connick, Roger W. Jordan, Jr., and C. Byron Berry, Jr. ("prosecutor defendants"). On June 5, 2001, the Court granted plaintiff Shareef Cousin's motion to file an immediate appeal with the Fifth Circuit Court of Appeals and granted his motion to stay all further proceedings against the remaining defendants in the interests of judicial economy. At the time cousin filed his appeal, this Court had not filed a final order of judgment under Rule 54(b).

Cousin now moves this Court to issue a final Judgement *nunc pro tunc* with respect to the Court's June 4, 2001 order. Defendants oppose this motion, questioning the Court's

jurisdiction to issue such a certification while the appeal remains pending.

II. Analysis

Before addressing plaintiff's motion for entry of final judgment, the Court must first address its authority to retroactively certify an appeal already filed. While there is conflicting Fifth Circuit guidance, the "more prevalent" guidance is that a district court may certify a judgment as "final prior to disposition on appeal." *Riley v. Wooten*, 999 F.2d 802, 805 (5th Cir. 1993) (quoting *Alcorn County v. U.S. Interstate Supplies Inc.*, 731 F.2d 1160, 1166 (5th Cir. 1984)) (citing numerous Fifth Circuit opinions to prove prevalence). *See also Crowley Maritime Corp. v. Panama Canal Commission*, 849 F.2d 951, 954 n.1 (5th Cir. 1988) ("Alcorn County is now the majority rule.") *Cf. Kirtland v. J. Ray McDermott & Co.*, 568 F.2d 1166, 1168 (5th Cir. 1978). Accordingly, the Court finds that it has the authority to certify its June 4, 2001 order as final.

When deciding whether to certify s judgment under Rule 54(b), a district court must make two determinations. *See Curtiss-Wright Corp. v. General Elec. Co.*, 446 U.S. 1, 7-8, 100 S. Ct. 1460, 1464-65 (1980). "First, the district court must determine that 'it is dealing with a final judgment.'" *Briargrove Shopping Ctr. Joint Venture v. Pilgrim Enterprises*, 170 F.3d 536, 539 (5th Cir. 1999) (quoting *Curtiss-Wright*, 446 U.S. at 7, 110 S. Ct. at 1464). A Judgment is final if "it is 'an ultimate disposition of an individual claim entered in the course of a multiple claims action.'" *Id.* (quoting *Curtiss-Wright*, 446 U.S. at 7, 110 S. Ct. at 1464). Second, the district court must determine "whether any just reason for delay exists." *Id.* (quoting *Curtiss-Wright*, 446 U.S. at 8, 110 S. Ct. at 1465). In making this determination, the district court must weigh "'the

inconvenience and costs of piecemeal review on the one hand and the danger of denying justice by delay on the other.'" *Road Sprinkler Fitters Local Union v. Continental Sprinkler Co.*, 967 F.2d 145, 148 (quoting *Dickinson v. Petroleum Conversion Corp.*, 338 U.S. 507, 511, 70 S. Ct. 322, 324 (1950)). A major factor the court should consider is whether the appellate court "'would have to decide the same issues more than once even if there were subsequent appeals.'" *H&W Indus., Inc. v. Formosa Plastics Corp., USA*, 860 F.2d 172, 175 (5th Cir. 1988) (quoting *Curtiss-Wright*, 446 U.S. at 8, 100 S. Ct. at 1465).

Here, under the first factor for determination, the Court finds that the June 4, 2001 order is an ultimate disposition because the Court found that the "prosecutor defendants" had immunity and dismissed them from the case. After weighing the considerations under the second factor, the Court finds no just reason to delay certifying that order as final, particularly in light of the fact that the Court also granted a motion on June 5, 2001 to stay the proceedings against the remaining defendants pending appeal on the immunity issue.

Therefore, the Court grants plaintiff's motion to enter final judgment.

New Orleans, Louisiana, this 4th day of February, 2002.

/s/ Sarah S. Vance
SARAH S. VANCE
UNITED STATES DISTRICT JUDGE

Appendix D

42 U.S.C.A. § 1983

UNITED STATES CODE ANNOTATED
TITLE 42. THE PUBLIC HEALTH AND WELFARE
CHAPTER 21--CIVIL RIGHTS
SUBCHAPTER I--GENERALLY

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

* * * *

42 U.S.C.A. § 1985

§ 1985. Conspiracy to interfere with civil rights

(1) Preventing officer from performing duties

If two or more persons in any State or Territory conspire to prevent, by force, intimidation, or threat, any person from accepting or holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof; or to induce by like means any officer of the United States to leave any State, district, or place, where his duties as an officer are required to be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duties;

(2) Obstructing justice; intimidating party, witness, or juror

If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;

(3) Depriving persons of rights or privileges

If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

Appendix E

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

SHAREEF COUSIN,	)	
	)	
Plaintiff,	)	
	)	Civil No. 00-0069
v.	)	
	)	
ANTHONY SMALL, DWIGHT	)	CIVIL RIGHTS
DEAL and PATRICK JONES,	)	under
NOPD Officers, along with BYRON	)	42 U.S.C. §§ 1983,
BERRY, also ROGER JORDAN	)	1985, 1986 & 1988
& GREG KENNEDY, individually	)	
and in their capacities as senior	)	Sect. R Mag. 2
Assistant District Attorneys,	)	
HARRY CONNICK, individually	)	
and in his capacity as District	)	
Attorney for Orleans Parish,	)	
RICHARD PENNINGTON, in his	)	
capacity as Superintendent, New	)	
Orleans Police Department, the	)	
CITY OF NEW ORLEANS, &	)	
JOHN ROE, an unknown Officer	)	
of the New Orleans Police	)	
Department,	)	*JURY TRIAL*
	)	
Defendants.	)	
	)	

COMPLAINT

Introduction

This civil action arises from the malicious prosecution, wrongful arrest, incarceration and prosecution of plaintiff Shareef Cousin. The actions of the defendants violated the rights, privileges, and immunities of the plaintiff as secured by the constitution of the United States and the constitutional, statutory, and pendent state claims of the law of the State of Louisiana. This action is brought pursuant to 42 U.S.C. §§ 1983, 1985, 1986, 1988, the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendment rights, and the constitutional, statutory, and other law of the State of Louisiana.

Jurisdiction

1. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1331 & § 1343. Also, the supplemental jurisdiction of this Court to hear claims arising under state law is invoked pursuant to 28 U.S.C. § 1367. All Defendants acted under color of state law.

2. Venue in this Court is appropriate under 28 U.S.C. § 1391(b) and § 1392.

Plaintiff

3. Plaintiff SHAREEF COUSIN is an adult resident of the Eastern District of Louisiana.

Defendants

4. All the defendants are of full age of majority and are residents of the Eastern District of Louisiana.

5. Defendant the CITY OF NEW ORLEANS is a municipality and unit of local government located in the State of Louisiana. It was at all relevant times the employer of the defendant police officers named below, and is directly liable for the acts complained of herein due to its policies and practices and its hiring, training, supervision and discipline of the defendant police officers. Defendant CITY OF NEW ORLEANS is also vicariously liable for the actions of defendant police officers as described herein, and the defendant prosecutors as described herein, under state law.

6. Defendant Richard PENNINGTON is, and was at all times pertinent to this complaint, the Chief of Police with the New Orleans Police Department. Defendant PENNINGTON is sued in his official capacity since he is a policymaking authority responsible for the training and actions of his subordinates. He knew or should have known of the numerous complaints against the defendant police officers, and of the pattern of rights violations committed by them, yet he failed properly to supervise, discipline, investigate or intervene in the abusive actions of the defendant police officers. He is directly liable for the acts complained of herein due to its policies and practices and its hiring, training and supervision of the defendant police officers. He is also vicariously liable for the actions of defendant police officers as described herein, under state law. He is a final policymaking authority.

7. Defendant HARRY CONNICK is, and was at all times pertinent to this complaint, the District Attorney for Orleans Parish. Defendant CONNICK is sued in both his individual and his official capacity since he is a final policymaker responsible for the training and actions of his subordinates. He knew or should have known of the numerous complaints against the Prosecutor Defendants and of the violations

committed by them, yet he failed properly to supervise, discipline, investigate or intervene in these abusive actions. He is a final policymaking authority.

8. Defendant Roger JORDAN is, and was at all times pertinent to this complaint, an Assistant District Attorney in the Office of the Orleans Parish District Attorney. He is, and was, a senior member of the office and was permitted final policymaking authority on various matters relevant below.

9. Defendant Greg KENNEDY was at all times pertinent to this complaint an Assistant District Attorney in the Office of the Orleans Parish District Attorney. He was a senior member of the office and was permitted final policymaking authority on various matters relevant below.

10. Defendant Byron BERRY was at all times pertinent to this complaint an Assistant District Attorney in the Office of the Orleans Parish District Attorney.

11. Defendant Anthony SMALL is, and was at all times pertinent to this complaint, a law enforcement officer with the New Orleans Police Department.

12. Defendant Dwight DEAL is, and was at all times pertinent to this complaint, a law enforcement officer with the New Orleans Police Department.

13. Defendant Patrick JOHNSON is, and was at all times pertinent to this complaint, a law enforcement officer with the New Orleans Police Department. He was a Sergeant at the time of the acts complained of herein.

14. The defendants here also include various unknown law

enforcement officers who participated in or are responsible for the actions that are the subject of this lawsuit. It is believed that most of these unnamed officers are adult residents of the Eastern District of Louisiana. They are sued in their individual capacities. To the extent any of them can be said to be policymaking authorities whose actions represent the official policy of the governmental entities they represent, they are sued in their official capacities.

15. Defendants CONNICK, JORDAN, KENNEDY and BERRY are sometimes referred to collectively below as "the Prosecutor Defendants."

FACTUAL ALLEGATIONS

16. When he was sixteen years old, Shareef Cousin was falsely charged with an offense for which the State of Louisiana sought his execution. The defendants conspired with each other to violate his civil rights.

DET. ANTHONY SMALL HAS LONG BEEN KNOWN BY THE NOPD AND HIS SUPERIORS TO BE CORRUPT AND INSUFFICIENT ACTION HAS BEEN TAKEN AGAINST HIM

17. Defendant Anthony SMALL joined the NOPD in 1979. On March 3, 1987, SMALL resigned from NOPD as a Police Officer III to "return to Oakland California. I have a job offer with the Oakland Police Department." In truth, from September 1987 until August 1988, Defendant SMALL worked for Tharco Containers, 2222 Grant Ave. San Lorenzo, CA, as a production worker manufacturing card board boxes.

18. Defendant SMALL returned to New Orleans, in

considerable debt. On March 26, 1989, the NOPD allowed Defendant SMALL to rejoin the force, returning as a police officer II. His returning salary was $1,548 per month.

19. On August 9, 1990, Defendant SMALL was transferred to Homicide to fulfill duties as a homicide investigator trainee, with a salary at $1,576/month. It was this transfer that put him in the position to be able to frame Plaintiff for murder.

20. The local state authorities, as well as the federal investigative authorities, had reason to know of Defendant SMALL's corrupt nature and the likelihood that he would commit crimes such as those detailed in this complaint before Plaintiff was falsely framed for this offense.

21. For example, the authorities had information that Defendant SMALL had agreed to "fix" a drug offense for a resident of St. Croix for a fee of several thousand dollars. Defendant SMALL was meant to alter his police reports and facilitate the suspect going free. This is what happened. The authorities looked into this allegation and determined that he had indeed collected the suspect from St. Croix, and the charges had subsequently been dismissed against the suspect.

22. The authorities had information that Defendant SMALL had committed crimes during his investigation of homicide scenes. For example, he had stolen jewelry from the victims in the Bennie Thompson case. He had stolen other jewels and valuables in other cases.

23. The authorities had information that Defendant SMALL was selling other confidential information that he obtained in the police department.

24. The authorities had information that Defendant SMALL was taking his reports home and doctoring them there, either to help criminals escape justice, or to frame a person in Plaintiff's position.

25. Defendant SMALL made comments to others with authority in the NOPD that they had "problems" with the case against Plaintiff, because Connie Babin could not legitimately identify Plaintiff as the killer. But, he said, he and the other officers would "resolve" this to make sure that she fingered Shareef Cousin when it mattered.

26. Defendant SMALL made comments that he had never failed to convict someone charged with murder and he was going to make sure that he did not start "losing" with the case against Shareef Cousin.

27. On November 5th, 1996, at 9:45am, Defendant SMALL gave a urine sample for random drug testing at Marine Medical. This test came back positive.

28. With respect to various of these acts of criminal misconduct Defendant SMALL was never even charged, and the NOPD did not even try to conduct a thorough investigation. While Defendant SMALL was initially suspended (on December 9th, 1996) and then fired (on March 5th, 1997) for testing positive for Barbiturates and giving no explanation for his possession of them, the NOPD did not take proper steps to make sure that the punishment was maintained.

29. For example, the NOPD did not even try to show that Defendant SMALL was guilty of committing other major crimes, including fabricating the evidence in this case. This failing was part of an unwritten NOPD policy not to charge its

officers with misconduct when that misconduct could unravel criminal charges. This policy applies even where it becomes clear that the conviction is unsafe, or should be reversed.

30. Far from helping to secure the dismissal of a crooked officer, as part of the work between the various conspirators against Plaintiff in this case, Defendant JORDAN agreed to appear as a witness on Defendant SMALL's behalf in his appeal. Defendant DEAL testified on Defendant SMALL's behalf.

31. Because of the inept manner in which the NOPD prosecuted Defendant SMALL's appeal, he was reinstated on the force and allowed to go back to working homicide cases with such other persons as Defendant DEAL.

32. When Plaintiff filed a written complaint with the NOPD concerning Defendant SMALL's criminal actions in this case, the NOPD responded publically that it had already conducted an investigation of its own and found no wrong-doing.

33. This was false, as no meaningful investigation was or ever has been conducted. This whitewash of the affair merely encouraged Defendant SMALL and others like him to continue in his criminal misconduct.

34. Defendant SMALL had a series of financial problems. Despite his low NOPD salary, he was able to live beyond his means. The history of his finances should have made it clear to the NOPD that he could not been securing all the money he was from his limited salary at the NOPD, and that he had to be on the take and committing criminal acts elsewhere.

35. In March 1986, Defendant SMALL had filed for bankruptcy. On April 22, 1986, judgment was entered against Defendant SMALL for money loaned to him by Connie Baker. On June 26, 1986, the court ordered seizure of Defendant SMALL's "movable properties" for fulfillment of a $5,186.40 loan.

36. On January 27, 1989, NOME Federal Credit Union filed suit against Defendant SMALL for the balance of $8,347.50 due on promissory note taken out on May 13, 1985.

37. On November 9, 1990, Stephanie Whitfield filed to divorce Defendant SMALL. There was no community property in the marriage and she sought payment by Defendant SMALL of half a medical bill that she had been forced to pay.

38. Despite all of these financial hardships, on July 30, 1992, Defendant SMALL was able to buy a home at 7542 La Fourche, paying $85,505 for it.

39. On June 14, 1994, Defendant SMALL's son, Anthony Small Jr., was charged with distribution of marijuana. His aliases were listed as Tyrone Smith and Kevin Small. He was later convicted on these charges.

DEFENDANT ROGER JORDAN HAS LONG BEEN KNOWN BY HIS SUPERIORS TO SUPPRESS FAVORABLE EVIDENCE AND NOT ONLY HAS INSUFFICIENT ACTION HAS BEEN TAKEN AGAINST HIM BUT HE HAS BEEN ENCOURAGED IN HIS VIOLATIONS OF THE LAW BY DEFENDANT HARRY CONNICK

40. Roger Jordan has worked for the Orleans Parish

District Attorney for several years. He was a prosecutor, and briefly left for private practice before being rehired by Defendant CONNICK. Even before he left he made it clear to various members of the defense bar that he would not turn over exculpatory material.

41. He has been encouraged in his attitude towards covering up exculpatory material by Defendant CONNICK. Defendant CONNICK has taken the position in the press that the burden of proof should be placed squarely on the defense to "scour" the evidence itself:

> But in a general observation, Connick . . . .said the burden is on the defense to scour the evidence file as soon as possible.

"Lawyers Claim DA's Withhold Evidence," Times-Picayune at A1 (Sunday, Sept. 21, 1997). Of course, Defendant CONNICK did not mention that this file is kept hidden from the defense.

42. Discovery violations are, sad to say, very common in Defendant CONNICK's office. Indeed, the Supreme Court and the Court of Appeals have reviewed many cases from Orleans Parish on the issue. *See, e.g., State v. Falkins*, 356 So. 2d 415 (La. 1978); *State v. Parker*, 361 So. 2d 226 (La. 1978); *State v. Curtis*, 384 So. 2d 396 (La. 1980); *State v. Perkins*, 423 So. 2d 1103 (La. 1982); *State v. Evans*, 463 So. 2d 673 (La. 1985); *State v. Rosiere*, 488 So. 2d 965 (La. 1986); *State v. Dozier & Muse*, 553 So. 2d 931 (La. App. 4th Cir. 1989); *State v. Knapper*, 579 So. 2d 956 (La. 1991); *State v. Smith & Wilkerson*, 591 So. 2d 1219 (La. App. 4th Cir. 1991); *State v. Oliver*, 682 So. 2d 301 (La. App. 4th Cir. 1996); *State v. Ates*, 418 So. 2d 1326, 1329 (La. 1982); *State v. Peters*, 406 So. 2d 189 (La. 1981); *State v. Davenport*, 399 So. 2d 201, 204 (La.

1981); *State v. Dawson*, 490 So. 2d 560, 563 (La. App. 4th Cir. 1986); *State v. Felton*, 522 So. 2d 626, 627 (La. App. 4th Cir. 1988); *State v. Carney*, 334 So. 2d 415, 418-19 (La. 1976).

43. Continual reminders form the appellate courts have not prevented on-going abuses. In *State v. Oliver*, 682 So. 2d 301 (La. App. 4th Cir. 1996), the accused had been sentenced to a total of 80 years in prison on charges of armed robbery and kidnaping. The court reversed the conviction because the prosecution withheld police reports. Once more, the Court reminded the D.A.'s office of its obligations:

> . . . the prosecution has a duty to comply with *Bagley* and the ABA Standards for Criminal Justice which call generally for prosecutorial disclosures of any evidence tending to exculpate or mitigate. *See ABA Standards for Criminal Justice, Prosecution Function and Defense Function, 3-3.11 (3d ed. 1993)*:
>
> A prosecutor should not fail to make timely disclosure, at the earliest feasible opportunity, of the existence of all evidence or information which tends to negate the guilt of the accused or mitigate the offense charged or which would tend to reduce the punishment of the accused.

Id. at 311-12.

44. In *Knapper v. Connick*, No. 96-0434 (La. 10/15/96), 681 So. 2d 944, the Court held:

> In our view, the determination of what information is exculpatory and must be turned over to the defense clearly falls within the course and scope of a

> prosecutor's traditional duties. It is . . . an integral part of the prosecutor's responsibilities as an advocate for the state.

Id. at 950.

45. Instead of adopting a policy that encouraged strict observance of the rule of law, Defendant CONNICK has encouraged his assistants to cheat on discovery. Time and time again, his staff have been caught violating the most basic rules of discovery.

46. Indeed, Judge Calvin Johnson saw such a pattern of discovery violations that he wrote an open letter to Defendant CONNICK, and every assistant district attorney (including Defendant JORDAN), reminding them of their duties, and promising sanctions if they failed to abide by them.

47. Such were the discovery violations in this case that Judge Waldron eventually ordered an open-file policy of discovery for everything that was not strictly work-product. Even then, Defendant CONNICK's office maintained a separate box of materials that included discoverable material.

48. As a result of this attitude, fostered by Defendant CONNICK, the Prosecutor Defendants in this case intentionally suppressed favorable evidence, a fact that has already been found by the Supreme Court. *See State v. Shareef Cousin*, No. 96-KA-2973 (La. 4/14/98), 710 So.2d 1065 (the Court notes that "[t]he prosecutor did not disclose this obviously exculpatory statement to the defense prior to the trial, as required by *Brady v. Maryland*, 373 U.S. 83 (1963), and *Kyles v. Whitley*, 514 U.S. 419 (1995)") (emphasis supplied).

49. Indeed, the attitude also resulted in the *Kyles* decision that arose from the same prosecutor's office. Other recent, highly publicized, instances have included the near-execution of John Thompson, despite evidence categorically proving his innocence of one crime charged against him.

50. In the *Cousin* case and the *Kyles* case, Defendant CONNICK contended and continues to state publically that his prosecutors did nothing wrong, despite authoritative rulings to the contrary. In the *Thompson* case, Defendant CONNICK sought only to blame a dead prosecutor and one who had long since left his office, and took no meaningful steps to redress a clear perception that there is a policy in his office that favors covering up exculpatory evidence.

51. It was not only in this case that Defendant JORDAN illustrated his refusal to turn over exculpatory materials. As far back as 1993 he stated his understanding of exculpatory material in *State v. Clarence Smith &Anthony Scire*, and made it clear that he thought that "exculpatory" material was only material that proved the accused innocent. Judge Jerome Winsberg corrected him at that time, and ordered the disclosure of materials that had not been turned over.

52. Since that time there have been various occasions when Defendant JORDAN has failed to abide by his discovery obligations.

53. He has also indulged in a pattern of abuses of the rights of suspects and witnesses, such as appeared in this case. One such case is *State of Louisiana v. Ricky Coston*, No. 388-723 (G), where Roger Jordan ordered Robin Snowton, the girlfriend of the defendant, to come to his office on June 5th, 1997, at 9 a.m., by sending her a fraudulent subpoena. She thought she

had to appear and was intimidated by the whole process. Defendant JORDAN coerced and misled her as to her rights, and indicated that she had to talk to him one way or another. When she properly asserted her right not to talk to him, or to have counsel present, he then said he would abuse the Grand Jury process to try to force her to talk to him.

54. Unabashed that he had been caught in an unethical and illegal act, Defendant JORDAN then conspired with one of his colleagues in the District Attorney's Office, Glenn Woods, and issued an illegal subpoena to the attorney to come explain himself to the Grand Jury. This was summarily quashed by Chief Judge Leon Cannizzaro. Defendant JORDAN and Mr. Woods then issued a Grand Jury subpoena to Ms. Snowton, ostensibly to ask her questions about another defendant in the case, NOPD Officer Wheeler Sullivan. Judge Cannizzaro allowed the questioning to go forward on the prosecutors' solemn promise not to question her about Mr. Coston. Defendant JORDAN and Mr. Woods immediately violated this assurance. Judge Cannizzaro suppressed the Grand Jury transcript in its entirety for intentional prosecutorial misconduct.

55. Defendant JORDAN has abused false "Article 66 Subpoenas" on a regular basis, with the blessing and encouragement of Defendant CONNICK.

56. These actions clearly violated the Code of Ethics, which provides:

> In representing a client, a lawyer shall not use . . . methods of obtaining evidence that violate the legal rights of . . . a person.

Disciplinary Rule 4.4.

57. When Defendant JORDAN forced prospective witnesses to appear under a false sanction of contempt, he also violated the State extortion statute, which defines extortion as follows:

> Extortion is the communication of threats to another with the intention thereby to obtain anything of value or any acquittance, advantage or immunity of any description. The following kinds of threats shall be sufficient to constitute extortion:
>
> * * *
>
> (2) A threat to accuse the individual threatened or any member of his family or any other person held dear to him of any crime;
>
> * * *
>
> (3) A threat to expose or impute any deformity or disgrace to the individual threatened or to any member of his family or to any other person held dear to him;
>
> * * *
>
> (5) A threat to do any other harm.

La. R.S. § 14:66.

58. Far from taking steps to redress these violations of the law, Defendant CONNICK has allowed his staff to continue to abuse these false subpoenas.

59. Far from sanctioning him for these patent violations of the law, Defendant CONNICK has promoted Defendant JORDAN in the office to the point where he is now one of the

most senior staff members.

THE FACTS OF THE CRIME

60. Michael Gerardi was shot outside the Port of Call restaurant on March 2, 1995, at 10:10 p.m.

61. On March 2, 1995, Shareef's Sam Bonart team played Hunter's Field as the fourth game played at Treme Center. Shareef was listed on the scoresheet, scored 10 points from the floor and made two free throws.

62. One of the suspects who committed the murder had already been spotted at 9:49 pm in the location of the Port of Call.

63. At 10:10 pm Michael Gerardi suffered a single gunshot wound to the head while standing on the drivers side of his Chevy Truck parked just north of 1316 Dauphine Street just down the street from the Port of Call Restaurant. Defendant SMALL has the time at 10:10 pm in his reports and his affidavit in support of the warrant.

64. At 10:30 pm NORD employees Craig Duncan, Alvin Richardson, and Charles Newton signed out of the Treme Center. The Bonart players were only then leaving the location.

65. As of 10:39 pm the police received a call regarding "poss. 4DR Blu/red suburban or a tan 4DR suburban, or a red/Burgundy veh. with wht top . . . poss lic. BGV456." This call was made by Jonathan Webb who had actually witnessed the three perpetrators getting into their car and who, as an avid birdwatcher, had watched with his binoculars and written down the vehicle number. He called 911 and reported the number.

Within 30 minutes of the murder, then, the police had the license plate associated with the real killers.

DEFENDANT SMALL'S FABRICATION OF A CASE AGAINST PLAINTIFF FROM THE START

66. Defendant SMALL represented under oath in seeking an arrest and search warrant:

> During the course of the investigation, the Detective developed the identity of the wanted subject, and Crimestopper tips corroborated this information. The Detective compiled a photographic line-up which contained a photograph of the Wanted Subject to present to the witnesses. On Thursday, 3-23-95 at 1:30 PM, the line-up was presented to one witness who tentatively identified the wanted suspect as the perpetrator. On Thursday, 3-23-95 at 9:05PM, the line-up was presented to a second witness who positively identified the wanted subject as being the person responsible for the shooting death of victim Gerardi. On Saturday, 3-25-95 at 7:15PM, the eyewitness, who was with victim Gerardi at the time of the shooting, positively identified the wanted subject as being the person she observed fire a single gunshot into the head of the victim.

(Small Warrant Affidavit)

67. Each of the "facts" identified in this affidavit was false or misleading, and was concocted by Defendant SMALL in conjunction with Defendant DEAL and other officers unknown in an effort to frame Plaintiff for this crime which he did not commit.

68. Each of the "facts" identified in this affidavit was known to be false or misleading by the Prosecutor Defendants. Yet none did anything to correct these lies and actively took investigative steps outside their roles as prosecuting attorneys in an effort to fabricate a stronger case against an innocent child.

69. Judge Dennis Waldron found these facts to be false and made a finding of perjury in the preparation of the warrant affidavit by Defendant SMALL. This finding is entitled to *res judicata* or collateral estoppel effect.

70. Defendant SMALL fabricated this story in his report as well. He took it home and changed it to make sure that he could put together this false case against Plaintiff. For example, Defendant SMALL and Defendant DEAL reported:

> The arrested subject was positively identified from a photographic line up by two independent eyewitnesses, and tentatively identified by a third.

71. These facts were false, and were fabricated by Defendant SMALL and Defendant DEAL, and then further confabulated by the Prosecutor Defendants, who intentionally suppressed the large quantity of evidence that would have proven the falsity of the affidavit and the entire case against Plaintiff.

THE CRIMESTOPPER "TIPS"

72. The first aspect of the affidavit by Defendant SMALL that was patently false and was fabricated as part of the effort to secure Plaintiff's arrest and false conviction was the statement that Crimestopper tips corroborated that Plaintiff was

the perpetrator of this crime.

Defendant Small fabricated the Crimestoppers Tip implicating Shareef Cousin

73. The only "tip" that suggested that Plaintiff was the perpetrator of the crime was *fabricated* by Defendant SMALL. On March 9, 1995, the *Times-Picayune* ran an article entitled: "Reward offered in Quarter killing." This was announcing that the "Bourbon Street Merchants Association is offering a $10,000 reward for information leading to the arrest of three men in the killing of a Slidell man last Thursday near a French Quarter restaurant." Defendant SMALL had already learned of this reward and decided to fabricate a report concerning Plaintiff.

74. That morning Defendant SMALL determined that Plaintiff had not been in custody at the time of the crime, and therefore would have no obvious way to defend against the crime.

75. On March 24th, 1995, at 10:05pm, Defendant SMALL reported receiving Crimestoppers form #3519. Supposedly, the caller stated that he heard Shareef Cousin telling another subject that he shot and killed a white man coming out of the "Port of Call." The caller added that Shareef lives in the basement of 3811 Marais. Shareef is described as "(Dark compl.) Skinny, short."

76. This was a fabrication based on what had been done by Defendant SMALL himself, and a friend of his, JOHN ROE. They had conspired to fabricate a Crimestoppers report so as to collect the $10,000 reward that was outstanding. Defendant SMALL knew that the call would not be traceable. He knew

that if a call were made, Crimestoppers would give the caller a number (here, 3519), and refuse to take any identifying information. Then, upon the arrest of the named suspect (here, Plaintiff), the informant would call back and identify himself solely as *Number 3519*. A confidential drop location would then be arranged with Crimestoppers, who would bring the money in cash and turn it over. Crimestoppers would never have any identifying information, and would never make any report to the Internal Revenue Service concerning the cash payment made. Defendant SMALL and ROE would pocket the money.

77. Defendant SMALL and ROE conspired to commit this crime in Defendant SMALL's home. ROE made the call, and made the collection. Defendant SMALL and ROE split the proceeds.

78. To ensure that the money would be paid on Number 3519, Defendant SMALL used his official position as NOPD lead detective on the case to assure Crimestoppers and the Bourbon Street Business Association that the crime would not have been solved but for tip 3519, which was totally false. Defendant SMALL had already framed Plaintiff by that time, and had already fabricated the purported identifications by Tierney and Larkins.

79. Defendant SMALL then swore on the affidavit for Plaintiff's arrest warrant that his other information had been corroborated by Crimestopper tips. This was totally false. First, the only "tip" that "corroborated" Plaintiff as the suspect was the one concocted by Defendant SMALL and ROE. Second, the other two tips identified other people who were the real killers.

80. The lie in the warrant was intended to mislead the defense, and succeeded in this regard. The defense was misled into thinking that there were no other suspects identified by Crimestoppers, and that the other information concerning Plaintiff was backed by an additional, confidential informant.

81. The Prosecutor Defendants suppressed this information, and any leads concerning this information, from the defense prior to Plaintiff's trial in an effort to secure his false conviction. The prosecutors also knew that the statements in Defendant SMALL's warrant application were false, but did nothing to correct them, or even identify the falsehoods for the defense.

Covering up the First Tip concerning the REAL killers

82. The other Crimestopper tips, which were kept from the defense by Defendants SMALL and DEAL, and the Prosecutor Defendants, exculpated Plaintiff and led to the real killers.

83. On March 12th, 1995, at 7:48pm Mims learned of the Crimestopper tip from two days previously, stating that there were suspects in the case: "The form was dated 3-10-95 and the anonymous caller named Antonio Harper, Derrick Smith and a subject known only as 'Brandon' as being the subjects responsible for the robbery/murder which occurred in the 1300 block of Dauphine." Another memo indicated that the subjects were Antonio Harper a/k/a Brian Frances; Derrick and Brandon LNU. Antonio usually drives his parents' white Blazer or his sister's red Ford tempo.

84. This crucial lead fit snugly with the evidence that had been developed on the night of the crime. Jonathan Webb, an eye witness whose name was kept from the defense by the

Defendants, watched the killers leave in their car and, because he was a bird-watcher by habit, used his binoculars. Within minutes of the crime, he had called in the license plate of the rapidly-departing car. The police immediately began searching for the BVG456 number. The printout for BVG456 was run at 11:39pm on the night of the crime. Thus, within an hour and a half of the crime the police got the name Christell B. Baham. The car is a 1989 Ford 4 door, that is red. Her address was listed as 945 Trianan Square, Apt. B, Gretna, La. 70056. They ran another check on her at 00:46 on March 3rd, and learned that she was a black female, born on September 6th, 1946, height 5'03 ", weight 136 lbs, and social security number 434-80-2403. This information was suppressed and kept from the defense until prior to the second trial.

85. On March 7, 1995, at 10:50pm, Det. Mims and Defendant SMALL went to 945 Trianon Square Apt. B to locate the BVG456 red Ford Escort which, they believed, "fits the general description given by some of the witnesses." They had determined that it was registered to Christell Baham, but they did not find her there. The resident said that she had moved. The officers did not follow up this crucial information for several days. The Prosecutor Defendants suppressed this information from the defense prior to Plaintiff's trial in an effort to secure his false conviction.

86. After receiving the Crimestoppers tip regarding Harper and Smith, on March 13th, 1995, at 10:50pm, Detectives Mims, Zenon and Lawless went to 3244 Desaix Street to find Antonio Harper. Det. Mims noted in his report *that parked outside the address was the car he had tried to find earlier in the week: a red Ford Escort registered to Christell Baham with plate # BVG456.* Christell Baham, he learned, was the mother of Derrick Smith.

87. Derrick Smith and Antonio Harper were at home and were taken to NOPD Homicide Division office. The Ford Escort was photographed. The Prosecutor Defendants suppressed this information from the defense prior to Plaintiff s trial in an effort to secure his false conviction.

88. At 11:15pm Mims advised Smith he was a suspect, reads him rights and questions him. Smith says that on 3/2/95 he left his house for his girlfriend's, Lisha Crawford at midnight and stayed there late before returning home. There was no corroborating evidence of this story. The Prosecutor Defendants suppressed this information from the defense prior to Plaintiff's trial in an effort to secure his false conviction.

89. At 11:25pm Mims questioned Antonio Harper about his whereabouts. Antonio said he got up at 8 am, stayed home till noon when he left for an hour to buy marijuana. He returned home, smoked the illegal drug and looked after his infant nieces, Shannon and Cierra, that afternoon. He did not go out that night. There was no corroboration of this story. The Prosecutor Defendants suppressed this information from the defense prior to Plaintiff's trial in an effort to secure his false conviction.

90. Det. Mims was told to let them go although there was now abundant evidence that they had driven the car away from the crime scene and had been identified as the killers. The Prosecutor Defendants suppressed this information from the defense prior to Plaintiff's trial in an effort to secure his false conviction.

91. Had the NOPD not corruptly removed Det. Mims from the case and replaced him with Defendant SMALL, and had the Defendants not covered up these facts from the defense at

Plaintiff's first trial, additional investigation would have revealed that these suspects were the ones who committed this crime.

92. Both Harper and Smith had extensive criminal records. These records revealed that they were "rap partners" in other criminal acts.

93. Indeed, had the NOPD not acted in the corrupt manner it did, there is a good chance that two other persons would not have lost their lives. On December 18th, 1996, Derrick Smith was charged with two counts of First Degree Murder arising out of an incident at 8700 Lakeforest Boulevard.

Covering up the Tip on Etienne

94. Contrary to the sworn affidavit concocted by Defendant SMALL, and covered up by the Prosecutor Defendants, this was not the only tip that did not corroborate the theory that Plaintiff committed this crime. On March 17th, 1995, Crimestoppers received a tip concerning Allen Etienne: "Caller states the suspect told him that he had committed the murder. Caller identified the suspects only as 'Allen', black male, age 20, 5'06" tall, dark complexion. Caller added the suspect lives on the street in the area of the murder." The Prosecutor Defendants suppressed this information from the defense prior to Plaintiff's trial in an effort to secure his false conviction.

95. Etienne had a long criminal history that should have led to the police showing a greater interest in him as a suspect. On December 12th, 1994, not long before the crime in this case, Etienne was arrested for Armed Robbery and First Degree murder. Defendant SMALL knew (and recorded in his report) that Etienne had been arrested for this murder. Etienne was

soon released indeed, he was briefly arrested again on January 11th, 1995, but released once more.

96. His rap sheet was considerable. On October 13th, 1994, Etienne was arrested at St. Louis & Bourbon for Armed Robbery. On January 16th, 1993, Etienne arrested for Armed Robbery at 601 Opelousas Street. On October 18th, 1990, Etienne was arrested for possession of an unregistered sawed-off shotgun with an obliterated serial number. He pled guilty and was sentenced to 3 years. On October 11th, 1990, Etienne was arrested for attempted armed robbery at 531 Elmira Street. He pled guilty and was sentenced to 3 years. On June 10th, 1989, Etienne was arrested for simple burglary at 6800 Martin Drive. On February 3rd, 1989, Etienne was arrested for simple burglary at 3332 Huntlee Drive.

97. Because of a pattern of intimidation, on several occasions the victims in the crimes refused to prosecute. Thus, because the State wrongfully prosecuted Plaintiff for the a crime that the Defendants knew he did not commit, no effort was made to determine Etienne's true involvement in Michael Gerardi's murder and others were left to be victimized.

98. In perhaps the first crime that might not have happened had the police not been intent on framing Plaintiff, on September 1st, 1995, Etienne was arrested for first degree robbery at Basin & N. Villere. On August 14th, 1996, Etienne was arrested at 800 N. Rampart for simple burglary. He later pled guilty. On November 6th, 1997, Etienne was arrested for Armed Robbery at 2800 Perdido. On April 24th, 1998, Etienne was arrested for Burglary of an Inhabited Dwelling at 901 N. Rampart. On July 12th, 1998, Etienne was arrested for Armed Robbery at Basin & Toulouse.

99. Minimal investigation would have shown that Etienne had lived very close to the other suspects, Harper and Smith. The Prosecutor Defendants suppressed this information from the defense prior to Plaintiff's trial in an effort to secure his false conviction.

THE FIVE LINE-UPS

100. Defendant SMALL represented in his warrant affidavit that he compiled a single line-up. This was false, and was a crucial fact. He actually compiled five line-ups that contained twelve of the known suspects. It was never revealed to the defense that there were twelve suspects in the line-ups. This would have been crucial to the defense case. The Prosecutor Defendants suppressed this information from the defense prior to Plaintiff's trial in an effort to secure his false conviction.

101. On March 23rd, 1995, at 1:30pm, Det. Defendant SMALL and DEAL met William Tierney at Matassas Grocery. Defendant SMALL's report reflects his decision to frame Plaintiff in that he only showed one of the five line-ups that he had developed with suspects in them the one with Plaintiff in it. He fabricated a 'reason' for this in his report: "to avoid burning the witnesses out by viewing thirty photographs compiled into five 6 picture line-ups which contained twelve suspects . . . ." The bias and suggestion in the manner in which the suspect list was compiled was patent, and yet the Prosecutor Defendants suppressed this information from the defense prior to Plaintiff's trial in an effort to secure his false conviction.

102. The truth was that Defendant SMALL, through suggestion and coercion, got Connie Babin to come around to identifying Plaintiff as the perpetrator, and tried to get other

witnesses to come closer to making an identification. This, despite the fact that he knew Plaintiff to be innocent. The Prosecutor Defendants compounded this, covering up Defendant SMALL's actions and, themselves, trying to make a false case against Plaintiff.

THE FABRICATIONS AND LIES SURROUNDING THE STORY TOLD BY CONNIE BABIN

103. The next patently misleading statement in the affidavit was the "fact" that there was a reliable identification made by Connie Babin. At 10:40pm on March 2nd, 1995, Officers Glaudi and Loescher made out the incident report with notes on Babin's statement to them:

> "Ms. Babin stated she did not get a good look at the perpetrators and probably could not identify them. Ms. Babin was visibly shaken up."

From shortly after the crime, it was clear that Babin could not make a positive identification of the killer.

104. On March 5th, at 8:37pm, Mims and Defendant SMALL went to 825 Marlene Drive in Gretna and got a recorded statement from Ms. Connie Babin. The resulting report, never turned over to the defense by Defendants CONNICK, KENNEDY, JORDAN or BERRY, reflected that "[t]he statement was the same as the oral statement Ms. Babin gave to Detective Pete Bowen on the night of the murder. The tape was placed in the case file for permanent record."

105. The tape recorded (and transcribed) version of the statement revealed that she could make a positive

identification. She said:

> "it was dark and I did not have my contacts nor my glasses so I'm coming at this at a disadvantage . . . ."

Suppressed March 5, 1995, Statement at 3.

106. She went on to say:

> "[L]ike you [Det. Small] said . . . they were worse off for me because of the fact that I'm near sighted, so that makes a difference like shaped . . . er, other than definitive, I could see . . . ."

(*Id.* at 4) The best she could say was that "I saw a movement, my . . . left eye perforated vision, and I knew it was a movement . . . ." (*Id.* at 2)

107. The statement was full of inconsistencies that would have been critically important to the defense. It was sent to the defense by a police officer who was horrified at the false testimony that Defendant JORDAN had persuaded Babin to give. The defense received it during the penalty phase of the trial in an unmarked brown envelope.

108. The Prosecutor Defendants suppressed this information from the defense prior to Plaintiff's trial in an effort to secure his false conviction. This, despite the fact that it was clearly exculpatory. *See State v. Shareef Cousin*, No. 96-KA-2973 (La. 4/14/98), 710 So.2d 1065 (the Court notes that "[t]he prosecutor did not disclose this obviously exculpatory statement to the defense prior to the trial, as required by *Brady v. Maryland*, 373 U.S. 83 (1963), and *Kyles v. Whitley*, 514 U.S. 419 (1995)") (emphasis supplied).

109. Defendant JORDAN admitted that he first received the Babin statement in June or July of 1995 many months prior to the trial. He made a specific assessment of the statement and affirmatively decided not to turn it over to the defense. He then went over Ms. Babin's testimony with her at least four times preparing her for her testimony. During this, he conspired with her to ensure that she would not reveal the damaging aspects of her pre-trial statements, and pressured her to falsify her testimony at Plaintiff's trial.

110. This was not the only information that was covered up. On May 10th, 1995, at 7:21pm, Defendant SMALL showed Babin the four additional lineups. She "tentatively identified photograph #X (Terrell Dorsey) as being a possible suspect." Babin placed her signature date and time on the back of photo #X. This was crucial evidence that Babin was identifying witnesses at random because Dorsey had nothing to do with Plaintiff, and there was no evidence that he had anything to do with the crime. Nonetheless, the defendants failed to provide this report to the defense, with the intention of facilitating Plaintiff's false conviction.

111. When it came to light that Babin had not been wearing her corrective lenses, and that she and Defendant JORDAN had conspired together prior to the first trial to prevent the truth from being known, her eyesight became a central issue in the case. Still intent on depriving Plaintiff of his civil rights, and ensuring that he would remain falsely incarcerated on these charges, Defendant JORDAN set about fabricating additional evidence.

112. Defendant JORDAN and Babin had various conversations over the time between the disclosure of the March 5th statement and the time that JORDAN was removed

from the case in an effort to cover up the fact that Babin's story was unreliable and false. Defendant JORDAN, in the meantime, covered up this correspondence and conversation, because it would have provided additional evidence that Babin was unreliable and prone to believing any outlandish theory that involved a potential black suspect. For example, on May 21, 1998, Babin wrote to Defendant JORDAN:

> "Remember I told you the other night about the old impala I saw not long after Mar. 2nd. Well you should know I know diddly squat about cars, turns out it was probably an old pontiac. I saw one early this am parked across the street, creme colored, faded top, either a light colored Afr. Amer./hispanic with baseball cap. He took off quick, turned his head, didn't get lic. plate, I had rollers in my hair and robe, tracking down 3 kittens left on side of my house, didn't want anyone to get full view of me in my early morning attire. I'll let you know if he comes back."

These kinds of correspondence were suppressed because Defendant JORDAN knew they would impeach the witness still more.

113. On August 27th, 1998, Babin faxed to Defendant JORDAN a falsified eye-prescription that was intended for transmission to the defense to mislead the defense as to the true state of her eyesight. Her Drivers License Physical Exam allegedly reflected that her right eye was 20/20 and her left was 20/40, with both being 20/20 together *without* corrective lenses. When the defense subpoenaed the originals of these documents, they reflected that her eyes were actually 20/40 *with* corrective lenses. This document had knowingly been fabricated as part of the conspiracy between Babin and Defendant JORDAN with

the intent of depriving Plaintiff of his civil rights.

114. The State had intended to introduce evidence of Babin's "good" eyesight at the second trial, but suppressed the documents that would have been used to blindside the defense. It was only when counsel noticed the fax cover sheet that associates of Defendant CONNICK admitted that they were still hiding the documents concerning her eye prescription.

FABRICATING A STORY ABOUT ALPHONSO LARKINS

115. The affidavit by Defendant SMALL also clearly lied about the identification by Alphonso Larkins, representing that it was a positive one.

116. In his report, Defendant SMALL represented that: "Mr. Larkins positively identified the wanted subject as being the perpetrator of the shooting death of victim Gerardi." This was absolutely false.

117. As Defendants SMALL and DEAL, as well as the Prosecutor Defendants, knew, at 11:20pm Alphonso Larkins gave a statement to Dwight Deal at the Port of Call. He made it clear that he could not identify anyone as the killer since he only saw the perpetrator's feet. The Prosecutor Defendants suppressed this information from the defense prior to Plaintiff's trial in an effort to secure his false conviction.

118. On March 23rd, at 9:05pm, Defendant SMALL took a tape recorded statement from Alphonso Larkins. This reflected that Larkins could not identify Plaintiff as the killer. This statement was intentionally suppressed, and the Prosecutor Defendants conspired to make sure that this would not come

out.

FABRICATING A STORY ABOUT WILLIAM TIERNEY

119. On March 10, 1995, at 10:26pm, Mims called William Tierney at home. Tierney told Mims he witnessed the murder and it happened quickly. He was walking home when he saw the shooting. The shooter had a stubby beard, was young and wearing a sweatshirt. This was critical evidence since Plaintiff did not have a stubby beard and the clothing description was inconsistent with other witnesses. The Prosecutor Defendants suppressed this information from the defense prior to Plaintiff's trial in an effort to secure his false conviction.

120. Defendant SMALL wrote in his report that Tierney stopped at the photo of Plaintiff and said "I see this guy in the Quarters *(sic)* a lot."

121. Defendant SMALL then took a tape-recorded statement from William Tierney. Defendant SMALL represented in his report that "Mr. Tierney tentatively identified the wanted subject." But Tierney never actually made even a tentative identification of Shareef in his statement. He said, "I don't wanna finger anybody and get the wrong [person] . . . ."

122. Defendant SMALL subsequently perjured himself as to the contents of Tierney's statement in his affidavit for an arrest warrant for Plaintiff. Prior to completing this false affidavit, he conspired with Defendant DEAL and other officers unknown to plot how to secure Plaintiff's false arrest.

123. Defendant JORDAN intentionally misled the defense

in preparations for trial into thinking that the references to Tierney (whose name was not known to the defense) were to a witness who had made a positive identification but was not now cooperating. The truth was that Tierney's evidence would have been exculpatory.

THE BOOTS

124. On March 27th, 1995, Defendant SMALL coordinated Plaintiff's arrest. The officers arrived at 3819 Marais, and arrested Shareef Cousin at home in his front yard. Defendant SMALL and Defendant DEAL assisted officers in the search. Defendant SMALL seized two pairs of lace-up boots found in the basement apartment by the door (brown ankle boots and black army type boots).

125. On March 30th, 1995, at 9:10pm, Defendant SMALL met Alphonso Larkins at the Port of Call restaurant and showed him the two pair of boots confiscated from Shareef's basement. Larkins denied that either pair was the one worn by the perpetrator.

126. On May 10th, 1995, at 7:15pm, Babin met with Defendant SMALL in the homicide office. Defendant SMALL showed Babin the two pairs of boots seized from Shareef's house. Defendant SMALL conceded in his report: "Ms. Babin was unable to identify either pair of boots as being the boots worn by the perpetrator."

127. Although he knew that the brown pair belonged to another person, that the black pair were far too small for Plaintiff to wear, and that both Babin and Larkins had said that the boots did not match those worn by the killer, Defendant SMALL subsequently conspired with the Prosecutor

Defendants to pretend that these boots were consistent with those worn by the killer.

128. The Prosecutor Defendants suppressed the exculpatory information concerning the boots from the defense prior to Plaintiff's trial in an effort to secure his false conviction.

129. Defendants JORDAN and BERRY then conspired with the witnesses prior to their testimony to present an impression that they knew to be false concerning the allegedly incriminating significance of the boots.

SUPPRESSING EVIDENCE OF OTHER SUSPECTS

130. Including the suspects already discussed above, the NOPD developed more than a dozen suspects. The NOPD reports reflect more: at least twenty potential suspects. The Prosecutor Defendants suppressed this information from the defense prior to Plaintiff's trial in an effort to secure his false conviction.

131. For example, on March 8, 1995, Mims viewed the Circle-K security tape and picked out a possible suspect wearing plaid shirt who was in the store at 9:49pm. In fact, Mims picked out three possible suspects from the video, and when the defense finally secured the tape (after its suppression by the Defendants) there were other potential suspects shown on the tape. The killer allegedly carried a brown paper bag with a recently-purchased alcoholic beverage, which would be consistent with his having visited the nearby Circle-K, which was the only store close to the scene. The Prosecutor Defendants suppressed this information from the defense prior to Plaintiff's trial in an effort to secure his false conviction.

132. There were various other very significant suspects. For example, given that the third suspect on the first Crimestopper tip (discussed above) was named "Brandon", it was critical that the NOPD and Defendants SMALL and DEAL had identified an individual named Brandon Dunbar as a possible suspect. He was born on April 22nd, 1974, which was consistent with the suspects, and he was 5'07", 155 lbs, also consistent with descriptions. He had a criminal history that included armed robbery and drugs. None of this information was revealed to the defense.

133. Another identified suspect was Antoine Stewart, a "rap" associate of Harper and Smith. Defendant SMALL got Stewart's name from Harper's "Rap Associates" sheet, one of many documents kept from the defense. He had a long criminal record that included at least two arrests for armed robbery, and various drug offenses.

134. The NOPD had apparently put out a request that other area police be on the look out for groups of three young black males Derrick Andrews, Darnell Bates and Ellis Pierce who were committing crimes similar to the death of Mike Gerardi. Lt. John Doran, St. Bernard SO, contacted NOPD homicide about an arrest that the SBSO had just made. The three were arrested on March 15th, 1995, at 8:20pm, in possession of a .357 gun with obliterated serial number. The photos of all three suspects were obtained by Defendant SMALL yet none of the names was turned over to the defense.

135. On March 29, at 4:05pm, Defendant SMALL returned a call to Sgt. Charles Robert of Winnfield Police Department concerning suspects in the Gerardi shooting. Three subjects had been arrested in Winnfield with a vehicle stolen out of New Orleans on March 10th, 1995, and were in possession of a .45

Caliber automatic weapon. The gun had its serial number obliterated. These suspects included Jermaine Johnson (DOB 12/28/76) and Michael Thile (DOB 7-10-77). None of this information was revealed to the defense.

136. As Defendant SMALL knew, but the defense did not, one of the "tentative" eyewitnesses had actually identified Sean Bailey as a possible perpetrator:

> "In viewing line-up #2, [Nicole] Longchamp tentatively identified photograph #2 (BofI #J83788) [Sean Bailey] and photograph #3 (BofI #J93672) [Derrick Andrews] as possibly being the person she observed standing on the corner of Dauphine and Barracks holding a large bottle of beer in a brown paper bag."

The defense eventually learned at the trial that she had made an identification of someone else, but never knew who that person was.

137. The NOPD also thought that Charles Lambert was a suspect. On March 16, at 5:40pm, two Fifth District police officers respond to a call for assistance to break up a rowdy crowd gathered outside the Big Apple Lounge at 2135 Pauger. The officers were dispersing the loiterers when a Green Olds Cutlass quickly backed up and drove toward one officer. The officer fired several shots at the vehicle before it pulled away. The officers pursued the car, lost it in chase, then found it abandoned in the 1800 block of North Roman Street. On March 17th, at 6:30pm, Charles Lambert, a 19 year old black male, turned himself in for the "attempted murder" incident.

138. Other listed suspects included Calvin Carmouche,

who was on probation at the time. The NOPD also listed Terrell Dorsey, Larry Francois, Dwayne Henry, Clayton Haywood, Rodger Harrison, Jermaine Hulbert, Glenn Johnson and James Rowell. Of particular significance is Rowell, since he was listed as a witness against Plaintiff at his first trial, yet the State suppressed evidence that he was considered a suspect, and had even been picked out of a photo lineup by Connie Babin. None of this information was revealed to the defense by the Prosecutor Defendants.

FRAMING SHAREEF COUSIN

139. The daily report for March 8, 1995, reflects the beginning of the effort to frame Shareef Cousin for this crime. Officer Chad Stokes is falsely reported as saying that "[h]e just arrested two juveniles for car jacking, and several armed robberies. The juveniles are Daniel Williams and Shareef Cousin. [*This was absolutely false.*] He arrested these males, and the males stated that they have been committing armed robberies in the French Quarter [*this was absolutely false*] with two other juveniles known only as 'Mumps' and 'Raoul.' Officer Stokes further stated that Williams and Cousins have been arrested with hardened criminals previously [*this was absolutely false*], and could possibly be the perpetrators, or know the perpetrators. He arrested Williams and Cousins in the 1200 block of Decatur Street [*this is absolutely false*], for Car Jacking, approximately an hour after the killing of Alfred Michael Gerardi [*this was absolutely false*], and on the same night. A third subject, who was with Williams and Cousins, eluded Officer Stokes [*this was absolutely false*]."

140. This report was patently fabricated, and yet the Prosecutor Defendants suppressed this information from the defense prior to Plaintiff's trial in an effort to secure his false

conviction.

CONSPIRING TO PREVENT THE TRUTH FROM COMING OUT, AND TO PLACE SMALL IN CHARGE OF THE INVESTIGATION

141. Detective Mims knew that the persons who almost certainly committed the crime included Antonio Harper (*a.k.a.* Brian Frances) and Derrick Smith. The identity of the third perpetrator was at that time unknown, but was under investigation.

142. "On Wednesday, March 15, 1995 at 8:00PM, The Homicide Power Watch commander, Sgt. Patrick Johnson, reassigned the Gerardi case to Det. Small." This was done in spite of the fact that Det. Mims believed he had brought the real killers into custody. This was part of the intentional effort to frame Plaintiff for the crime.

143. Defendant JOHNSON thereby conspired with Defendant SMALL and others unknown to prevent Det. Mims from seeking the truth, and protecting Plaintiff from this false and concocted charge.

COVERING UP WITNESSES WHO KNEW PLAINTIFF HAD NOT COMMITTED THE CRIME

144. The defendants knew that there were witnesses available who could totally exclude Plaintiff as being the person who committed this crime. Yet the defendants took steps to make sure that this information was not in the police reports, and that none of it would reach the defense.

145. On April 3rd, 1995, at 8:40pm, Defendant SMALL

interviewed Rodney Smith at his residence. Smith lived across the street from the Port of Call. Smith saw nothing but told Defendant SMALL that his family members did. Defendant SMALL spoke with at least one exculpatory witness, Peter Robinson, that night.

146. The next day this lead caused Defendant SMALL to speak with Rebecca Tekin, who was able to tell him categorically that Shareef Cousin was not the person who committed this crime. Defendant SMALL kept the most exculpatory information out of his report. However, his report would still have provided the defense with a critical lead. For example, although James Rowell was a witness against the defense at the first trial, the prosecutors did not turn over the fact that Ms. Tekin identified him as being the closest fit to the description of the killer. This would have been crucial exculpatory information.

147. The Prosecutor Defendants suppressed the exculpatory information concerning Ms. Tekin from the defense prior to Plaintiff's trial in an effort to secure his false conviction. It was only years later, when the defense secured a copy of the report and was able to locate Ms. Tekin, that this information came to light. When counsel was asked by the prosecutors at the second trial whether the defense had found Ms. Tekin, this was one of the major reasons that led to the dismissal of the charges.

148. There were leads to several other exculpatory witnesses in this report, including Turan Tekin, Peter Robinson, and others. None of this was made available to the defense by the Prosecutor Defendants.

SECURING A FALSE INDICTMENT

149. With Defendant KENNEDY spearheading the effort, the Defendants secured an indictment against Plaintiff based on the evidence known to be false, and by failing to present any of the evidence known to be exculpatory.

ILLEGAL ACTIVITIES CONCERNING WITNESSES WHO PROVIDED PLAINTIFF WITH HIS LEGITIMATE ALIBI

150. The defense made known to the prosecution the fact that Plaintiff had an alibi that was actually recorded on videotape. The Defendants, including Defendant SMALL and the Prosecutor Defendants, were not interested in determining that the alibi was valid, but were focused solely on taking illegitimate and criminal steps to seek to destroy any evidence that might stand between them and a false conviction.

151. Defendants KENNEDY and JORDAN conspired with Defendant SMALL and Defendant BERRY to seek to eliminate this defense and prevent the defense from developing witnesses who could further establish it.

THE ALIBI

152. On April 18th, 1995, at 1:00pm, Defendant SMALL spoke with Defendant KENNEDY about the Gerardi case at a three day seminar sponsored by the FBI held in the Charity Hospital School of Nursing. Defendant KENNEDY told Defendant SMALL that defense attorney Willard Hill has provided documents concerning Shareef Cousin's participation in a NORD basketball game at Treme gymnasium on the night of the shooting, and Coach White's claim that he gave Shareef

Cousin a ride home after the game.

153. Defendant SMALL knew that Plaintiff was innocent, and that the alibi was valid, but continued in his efforts to frame Plaintiff.

COERCION AND THREATS OF WITNESSES

154. In the meantime, the Prosecutor Defendants also went well beyond their role as attorneys in investigating and coercing witnesses in this case.

155. On October 10th, 1995, Coach Eric White received an illegal "Article 66 subpoena" from Harry Connick's office to report for an interview in the Grand jury room. Coach White felt compelled to respond to this illegal subpoena because it made clear that he was required to appear and give evidence to the prosecuting attorneys. For this reason, because he had been intentionally misled by Defendant JORDAN and the Prosecutor Defendants, he met with them to discuss the case.

156. On October 12th, 1995, Arian White honored the illegal "Article 66 subpoena" from Harry Connick's office report for an interview in the Grand jury room. Ms. White compelled to respond to this illegal subpoena because it made clear that she was required to appear and give evidence to the prosecuting attorneys. For this reason, because he had been intentionally misled by Defendant JORDAN and the Prosecutor Defendants, she met with them to discuss the case.

157. On or about October 10th, 1995, James Smith received an illegal "Article 66 subpoena" from Harry Connick's office to report for an interview in the Grand jury room. He felt compelled to respond to this illegal subpoena because it made

clear that he was required to appear and give evidence to the prosecuting attorneys. For this reason, because he had been intentionally misled by Defendant JORDAN and the Prosecutor Defendants, he met with them to discuss the case and provided them with a tape recorded statement.

158. On or about October 10th, 1995, Sheila Smith received an illegal "Article 66 subpoena" from Harry Connick's office to report for an interview in the Grand jury room. He felt compelled to respond to this illegal subpoena because it made clear that he was required to appear and give evidence to the prosecuting attorneys. For this reason, because he had been intentionally misled by Defendant JORDAN and the Prosecutor Defendants, he met with them to discuss the case and provided them with a tape recorded statement.

159. On or about October 10th, 1995, Raymond Goodwill received an illegal "Article 66 subpoena" from Harry Connick's office to report for an interview in the Grand jury room. He felt compelled to respond to this illegal subpoena because it made clear that he was required to appear and give evidence to the prosecuting attorneys. For this reason, because he had been intentionally misled by Defendant JORDAN and the Prosecutor Defendants, he met with them to discuss the case and provided them with a tape recorded statement.

160. On or about October 10th, 1995, Don Matthieu received an illegal "Article 66 subpoena" from Harry Connick's office to report for an interview in the Grand jury room. He felt compelled to respond to this illegal subpoena because it made clear that he was required to appear and give evidence to the prosecuting attorneys. For this reason, because he had been intentionally misled by Defendant JORDAN and the Prosecutor Defendants, he met with them to discuss the case and provided

them with a tape recorded or written statement.

161. On or about October 10th, 1995, Aaron Williams received an illegal "Article 66 subpoena" from Harry Connick's office to report for an interview in the Grand jury room. He felt compelled to respond to this illegal subpoena because it made clear that he was required to appear and give evidence to the prosecuting attorneys. For this reason, because he had been intentionally misled by Defendant JORDAN and the Prosecutor Defendants, he met with them to discuss the case.

162. On or about October 10th, 1995, Romanza Hayes received an illegal "Article 66 subpoena" from Harry Connick's office to report for an interview in the Grand jury room. He felt compelled to respond to this illegal subpoena because it made clear that he was required to appear and give evidence to the prosecuting attorneys. For this reason, because he had been intentionally misled by Defendant JORDAN and the Prosecutor Defendants, he met with them to discuss the case.

163. On or about October 10th, 1995, Rene Douglas received an illegal "Article 66 subpoena" from Harry Connick's office to report for an interview in the Grand jury room. He felt compelled to respond to this illegal subpoena because it made clear that he was required to appear and give evidence to the prosecuting attorneys. For this reason, because he had been intentionally misled by Defendant JORDAN and the Prosecutor Defendants, he met with them to discuss the case.

164. On or about October 10th, 1995, Raymond Douglas received an illegal "Article 66 subpoena" from Harry Connick's office to report for an interview in the Grand jury room. He felt compelled to respond to this illegal subpoena because it made clear that he was required to appear and give evidence to the

prosecuting attorneys. For this reason, because he had been intentionally misled by Defendant JORDAN and the Prosecutor Defendants, he met with them to discuss the case.

165. But for the fact that they were illegally coerced into speaking with the prosecutors in a manner known by the prosecutors to be thoroughly illegal, these witnesses would not have spoken with people who were clearly attempting to secure a false conviction against an innocent child.

166. In these illegal actions, the Defendants intended solely to secure statements to try to damage an alibi defense that they knew to be true. Indeed, all but one of the statements were consistent and strongly supported the alibi defense. Yet the Prosecutor Defendants did not turn the statements over to the defense and sought to suppress them. Since the defense had not spoken with some of the witnesses, this resulted in substantial prejudice to Plaintiff's case.

167. From Eric White, the Prosecutor Defendants got a tape with a slip-up denoting the time that the game had ended. This mistake was revealed by many other statements taken from these witnesses and others, proving it impossible for Plaintiff to have committed this crime. However, because the Prosecutor Defendants were not interested in justice, but only in securing a false conviction against Plaintiff, they conspired to ensure that the single false statement regarding the time of the game's ending was the only one that would see the light of day at trial.

168. The witnesses were all intimidated by this show of official force, and it contributed to the fact that not all were available to the defense at the time of trial.

FALSE ARREST OF WITNESSES

169. When the first trial was on-going, there were various witnesses who were waiting in the halls of the courthouse because they might be needed as witnesses.

170. Defendant JORDAN and Defendant BERRY literally kidnaped four potential alibi witnesses, and secreted them in the Office of the District Attorney for the duration of trial, where they were not available for the defense to call them as witnesses.

171. At the motion for a new trial, Defendant JORDAN admitted that he and Defendant BERRY secreted at least three people over to the D.A.'s Office, including Romanza Hayes, Michael Doss and Don Mathieu, as well as James Smith. He knew that all four were listed as defense alibi witnesses. He therefore knew that they might all four be called as defense witnesses.

172. Michael Doss was a teammate of Shareefe's who was under a defense subpoena. He would have testified that the game did not end until after ten p.m. When he was waiting in the hall to testify, he spoke with Willard Hill, one of the defense lawyers. Later, he was told by a member of the D.A.'s Office to go over there and stay. The prosecution knew of his exculpatory evidence and secreted him from the defense at the time of trial.

173. James Smith was on the opposing *Hunters Field* team, and was subpoenaed as an alibi witness by the defense. He, too, spoke with the prosecution prior to trial, and told them that the game started late. After playing, the team had a short pep talk from their coach, Tyrone Wilson, as they were

removing their uniforms. He got home when the ten o'clock news was going off. His mother, Sheila, was watching it, waiting up for him to get there. Before the trial, as detailed above, he had been illegitimately summoned into the DA's office by Defendant JORDAN. Smith, too, was secreted during trial for a couple of days.

174. Don Mathieu Jr. was a player for the team playing against Shareef, *Hunters Field*. He was subpoenaed by neither side, but appeared at the court on his own account. He recalled that the game got rescheduled and it was not over until late, definitely after ten p.m. At the time of the trial, he believed it was a police officer of some kind who told him to wait in the D.A.'s office. He had exculpatory evidence to provide, and he was secreted away from the defense at the time of trial.

175. Defendant JORDAN placed his assistant, Defendant BERRY, on the stand at the motion for a new trial. Prior to BERRY's testimony, JORDAN and BERRY had gotten together to conspire to cover up the misdeeds that they had committed. They concocted a ludicrous tale of lies to try to get out of trouble. Defendant BERRY actually swore under oath that the abduction of the witnesses had taken place because there was air conditioning in the DA's office. When cross-examined by the defense, he had to admit that the case was tried in January.

176. The manner in which these witnesses were kidnaped and secreted away did not constitute mere misconduct, but a criminal offense.

177. Defendant JORDAN violated one of the criminal statutes that he is bound to up-hold, one that carries a sentence of life imprisonment. *See La. R.S. 14:44*. The Code defines the

offense of Aggravated Kidnaping as follows:

> Aggravated kidnaping is the doing of any of the following acts with the intent thereby to force the victim, or some other person, to give up anything of apparent present or prospective value, or to grant any advantage or immunity, in order to secure a release of the person under the offenders actual or apparent control:
>
> (1) The forcible seizing and carrying of any person from one place to another; or
>
> (2) The enticing or persuading of any person to go from one place to another; or
>
> (3) The imprisoning or forcible secreting of any person.

La. R.S. 14:44. This fits exactly what Defendants JORDAN and BERRY did to the four witnesses kidnaped and taken back to their office.

178. This was also clearly unethical. The Code of Ethics explicitly provides that:

> A lawyer shall not . . . request a person other than a client to refrain from voluntarily giving relevant information to another party . . . .

Disciplinary Rule 3.4(f).

179. Far from take any actions against Defendant JORDAN and Defendant BERRY for these outrageous acts,

Defendant CONNICK defended them as if they had done nothing wrong.

THE COVER-UP: CONTINUING EFFORTS

180. The efforts to pervert the course of justice, cover up evidence of Plaintiff's innocence and secure a false conviction against him did not begin and end with the first trial. The only reason that the first *Brady* violation (the March 5th Babin statement) came to light was because one honest police officer provided it to the defense. The only reason that the defense secured the rest of the police report was because another honest police officer did the same thing. None of the exculpatory evidence was turned over voluntarily by the Prosecutor Defendants until long after it was clear that the defense already had it all. Even then, the Prosecutor Defendants and the others in the Office of the District Attorney continued to try to cover up the truth.

181. For example, when the case was remanded to the trial court, Defendant JORDAN met with counsel for Plaintiff outside the courtroom prior to a hearing. Confronted with the fact that the State had violated its discovery requirements, Defendant JORDAN lied to defense counsel and stated that there was no exculpatory material to be turned over. Defense counsel warned Defendant JORDAN that if he made the same representation under oath in the courtroom, he would expose himself to perjury charges.

182. Later, on May 29th, 1998, at 8:00am, Judge Waldron entertained limited argument on defense discovery motions. Now, confronted with evidence that Plaintiff's lawyers already knew about some of the materials, and uncertain how much information the defense already had, Defendant JORDAN for

the first time turned over portions of the NOPD file, along with Connie Babin's grand jury testimony. This contained a massive amount of exculpatory evidence that had been suppressed at the first trial and illegally withheld for more than three years.

183. On June 4th, 1998, at 3:00pm, Judge Waldron canceled the scheduled motions hearing. Unaware of the cancellation, Defendant JORDAN, joined by ADA Val Salino, appeared and handed over to the defense more of the homicide police file (which again had been suppressed for more than three years).

184. When confronted with the fact that he was still covering up exculpatory evidence, and that a hearing would have to be held on the criminal acts that he had performed, Defendant JORDAN withdrew from the case rather than face the legal music.

185. After he had departed, his place was taken by a much more honest duo of Assistant District Attorneys, Val Solino and Joe Lucore, who nonetheless retained in their files other exculpatory evidence that Defendant JORDAN had suppressed for more than three years. They also retained evidence of the various investigative forays conducted by Defendant JORDAN that had been intended to concoct a false case against Plaintiff.

186. Some of this has since come to light; some has not.

BUILDING POLITICAL PRESSURE

187. In the meantime, all the defendants but particularly Defendants PENNINGTON and CONNICK were r esponding to the political pressure that surrounded this case. For example,

on March 5th, 1995, the Times-Picayune ran "A WEEK OF VIOLENCE" column, listing the Gerardi shooting death. Mayor Morial called the week the most difficult since he took office. Defendant PENNINGTON was under pressure to solve the crime. He also voiced his desire to do more for people in the French Quarter, due to the racially biased notion that murders in that part of town are somehow more important than deaths of poorer people in other sections of the city. In the metro section, the paper ran an article titled "More cops, better lighting are ordered for the Quarter." In the article, Defendant PENNINGTON promised a beefed-up security presence in the Quarter.

188. On March 11, 1995, the *Times-Picayune* ran a front page article on "Crime's effect on tourism debated - Conventions are holding steady." The article referred to the Gerardi case with Terry Epton, vice president of the destination management company USA Hosts quoted as saying: "That's [Gerardi's death] a reprehensible situation . . . [the shooting shows] a breakdown in this city's ability to protect visitors to the city."

189. The defendants acted in a racist and biased manner predicating their actions on their own racist perception that the public wanted the blood (basically any blood would do) of a young black male for this homicide crime against a young white male in the French Quarter.

INTENTIONAL SLANDER & LIBEL

190. At the same time, throughout the proceedings in this case and even after the dismissal of the charges against Plaintiff, the defendants made comments and took actions designed to ensure official commentary that defamed Plaintiff

and subjected him to public shame and th ruination of his reputation.

191. For example, on March 28th, 1995, in the first of many articles libeling Plaintiff that were intentionally provoked by Defendant SMALL and the other officers with the NOPD, the *Times-Picayune* ran a front page article titled, "Teen is held in N.O. murder." This announced, *per* NOPD spokesperson Sam Fradelia, that a teenager arrested at his family home was booked with the murder as a juvenile. The article reported that the police had established robbery as the motive for the crime. The article also reported that Plaintiff may have committed various other murders as well:

> "Case Detectives Dwight Deal and Anthony Small . . . are investigating whether Gerardi's killers have been invoked in other robbery incidents, including the murder of Rev. Karl Peterson, pastor of the Sts. Peter and Paul Catholic Church."

This was absolutely false and had no basis in fact.

192. On March 29th, the *Times-Picayune* ran a front page article: "Quarter murder suspect rebooked." The article reports the false information intentionally fabricated by Defendant SMALL, stating that "an informant linked him to the killing." The article made it clear that all of the false statements came from Defendant SMALL:

> "Also on Tuesday, the murder case was transferred to adult court and he was ordered held without bond by a Juvenile Court judge. Judge George Kiefer based his decision on the testimony of Anthony Small, the only witness at a closed hearing. Small testified that

a witness had identified Cousin as one of the killers, sources said."

As Defendant SMALL would have been able to predict, these falsehoods were picked up by other media outlets. For example, under a headline "16 year old charged, two sought in slaying," the Baton Rouge newspaper related that Judge George Keifer found probable cause to book Shareef Cousin. The article noted that this murder was one of 21 murders during that week and that the Bourbon Street Merchants had offered a $10,000 reward for providing information leading to the arrest of Gerardi's assailant.

193. As a result of the illegal acts that he committed, Defendant SMALL would have known that Plaintiff would have been falsely tarred as the killer. Indeed, on May 26th, 1995, the Times Picayune ran an article titled: "Teen indicted in killing outside Quarter eatery."

194. The articles also show other sides of the political manner in which the NOPD approached the crime problem, desperate to "solve" as many cases as possible. For example, on March 3rd, 1996, the *Baton Rouge Advocate* reported in "Keeping safe in the city" how Michael Gerardi's murder was an illustration of those that occur in New Orleans. The article noted the problems in the French Quarter with tourists being harassed by scary looking kids, and how the NOPD is working on its "resolution" rate for murder, which was only 50 percent in 1994 and 95. This culture of "solving cases" helped to create the environment where it was possible indeed, encouraged for corrupt of ficers and prosecutors to commit crimes such as those committed in this case in order to "solve" crimes (albeit falsely).

195. Harry Connick Sr. and his Prosecutor Defendants continued to defame Plaintiff as the case unraveled. For example, on August 5th, 1996, in the Louisiana Weekly exclusive interview Connick's answer to a query about Shareef's case was that it was "a conviction that was based on fact . . . ."

196. Even after his office elected not to retry the case, he insisted that Plaintiff was actually guilty of the crime charged. Rather, he insisted that the evidence was not sufficient to try Plaintiff. In truth, precisely the same evidence was available to the prosecution; it was simply that the defense had been allowed access to additional evidence that proved the prosecution's case to be utterly false.

RACIAL BIAS IN THE NOPD AND CONNICK'S WORK

197. In the meantime, other evidence surfaced of the racist and biased manner in which the NOPD and Defendant SMALL, along with Connick and his Prosecutor Defendant assistants, pursued Plaintiff on these charges.

198. For example, on September 2nd, 1996, the Louisiana Weekly reported how "Connick takes heat for racist video tape." This detailed how a tape made in the 1980's reflected four of his investigators making fun of blacks and employing racial slurs. The article also noted that the Justice Department several weeks prior announced an investigation into the prosecution of African American males by the DA's office.

199. At the same time, a study of several years of prosecutions in Connick's office showed a marked disparity along the lines of race.

200. Plaintiff was the only person in fifty years where the D.A.'s Office had secured a sentence of death for a crime allegedly committed at the age of 16. Over the years of the study, every 16 year old person where a sentence of life without parole had been imposed had been African-American. The reason that Plaintiff's case was pursued in the illegal manner set forth in this complaint revolved around issues of racial discrimination, and the effort to pander to the perceived white majority in the French Quarter.

201. The same racist practices permeated the NOPD, and permitted or encouraged corrupt officers like Defendant SMALL to commit their crimes against African-American defendants.

202. The decisions made in this case further illustrated the racist manner in which the prosecution was conducted. Defendant JORDAN, for example, used *thirteen* of his fourteen peremptory challenges to deprive African-American jurors of their right to participate in jury duty.

HISTORICAL EVIDENCE THAT HOMICIDE DETECTIVES CONSPIRE TO FALSIFY EVIDENCE

203. It is well known within the police department that various officers, particularly those involved in homicide investigations, will get together to falsify evidence prior to their testimony. No meaningful steps have been taken to prevent or eradicate this.

204. Despite the large number of serious complaints that have been made concerning the officers involved in this case, as well as other officers involved in homicide investigations, no meaningful steps have been taken to discipline them and

remove them from their posts.

205. The NOPD has also taken steps to cover up critical evidence of bias concerning their police officers, so as to limit the chance that such evidence will be available to persons in Plaintiff's position.

206. The Homicide Detective Defendants have several disciplinary violations, and even more violations of the law and police regulations that have not been meaningfully investigated or sanctioned by the NOPD or the Supervisory Defendants.

207. The Defendants knew or intended that Plaintiff would remain incarcerated as a result of these actions for months prior to his trial.

208. The Defendants knew or intended that the media would publish that Plaintiff was a murderer and irrevocably tarnish his name and reputation.

209. The Defendants knew or intended that Plaintiff would be forced to sit through a trial where his life was at stake, listening to prosecuting attorneys argue inflammatory and insulting things about him, and call for his death.

210. On January 8th, 1999, the Friday before the Monday trial was set to begin, the Office of the District Attorney elected to dismiss the charges against Plaintiff.

CAUSES OF ACTION

211. Plaintiff alleges the following causes of action against the Defendants:

FEDERAL § 1983 CAUSE OF ACTION

212. Plaintiff reincorporates all other allegations in his complaint in this cause of action.

213. All of the unconstitutional actions taken by the Defendants were intentionally committed in violation of Plaintiff's rights to security from illegal search, seizure, arrest and detention, his right to counsel, and his right to Due Process and Equal Protection, as protected by the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendment rights. *See 42 U.S.C. § 1983.*

§ 1983 CONSPIRACY CAUSE OF ACTION

214. Plaintiff reincorporates all other allegations in his complaint in this cause of action.

215. The Defendants acted in combination and in concert to commit an unlawful act or acts where they agreed to concoct a false case against Plaintiff.

216. Defendant PENNINGTON failed to take timely disciplinary action against his subordinates despite the clear evidence that Small had violated various departmental regulations.

217. The Defendants fabricated evidence against Plaintiff and used it to secure his arrest and continuing detention for 4 years on charges of First Degree Murder.

218. The Defendants conspired to cover up the evidence of misdoing on their part.

219. The Defendants acted with racial animus and prejudice in violating Plaintiff's rights.

§ 1985 CONSPIRACY CAUSE OF ACTION

220. Plaintiff reincorporates all other allegations in his complaint in this cause of action.

221. Plaintiff incorporates and realleges the other paragraphs set forth above, and throughout the rest of this complaint.

§ 1983, 1985, 1986 VIOLATION OF THE FOURTH AMENDMENT

222. Plaintiff reincorporates all other allegations in his complaint in this cause of action.

223. The defendants arrested Plaintiff and searched his home in violation of his constitutional rights, *see U.S. CONST. amend. IV, La. Const. Art. I*, and Due Process and the Equal Protection of the Laws. *See U.S. CONST. amend. XIV*; *see generally, 42 U.S.C. §§ 1983, 1985, 1986.*

224. The right not to be arrested, and have your home searched, based solely on false and perjured evidence is well-established and well-known. *See, e.g., Franks v. Delaware*, 438 U.S. 154 (1978).

225. Defendant SMALL, operating in conjunction with Defendant DEAL, fabricated a false basis for Plaintiff's arrest and the search of his home. The Prosecutor Defendants knew about this since they had the records to prove it.

226. Prior to the second scheduled trial of this case, this evidence of a violation of Plaintiff's rights was hidden from the defense, both intentionally by the Defendants and because of the wholesale violation of Plaintiff's right to disclosure of favorable evidence.

STATE LAW VIOLATION OF THE RIGHT TO FREEDOM FROM FALSE ARREST AND UNCONSTITUTIONAL SEARCH

227. Plaintiff reincorporates all other allegations in his complaint in this cause of action.

228. The Defendants intentionally violated Plaintiff's state constitutional rights.

STATE & FEDERAL LAWS OF TORT

229. Plaintiff reincorporates all other allegations in his complaint in this cause of action.

230. Defendants knowingly and intentionally falsified evidence with the intent to ensure that Plaintiff would remain unconstitutionally detained, and with the intent to secure an unconstitutional conviction against him.

231. Defendants violated Plaintiff's civil rights in violation of State law. These actions also constitute independent tortious acts involving the knowing commission of a criminal offense against Plaintiff.

232. The Prosecutor Defendants committed the crime of extortion with the intent to deprive Plaintiff of his civil rights. *See La. R.S. § 14:66.*

233. The Defendants coerced and threatened witnesses to elicit statements concerning the case.

234. Defendant JORDAN and others unknown committed the crime of interference with witnesses with the intent to deprive Plaintiff of his civil rights. *La. R.S. § 14:129.1* (West 1981).

235. Defendants committed the crime of obstruction of justice with the intent to violate Plaintiff's civil rights. *La. R.S. § 130.1.*

236. All of the Defendants committed malfeasance in office with the intent to violate Plaintiff's civil rights. *La. R.S. § 14:134.*

237. Defendants SMALL, DEAL, JORDAN, KENNEDY and BERRY committed the crime of conspiracy to commit perjury with the intent to violate Plaintiff's civil rights. Ultimately, as a foreseeable and intended result of this conspiracy, Defendant SMALL did commit perjury in the proceedings against Plaintiff. *La. R.S. § 14:123.*

238. Plaintiff was damaged by these actions and is entitled to redress for it. *La. Code Civil Pro. Art. 2315* ("Every act whatever of a man that caused damage to another obliges him by whose fault it happened to repair it."); *42 U.S.C. § 1983, 1985, 1986, 1988; U.S. Const. amend. IV, V, VI, VIII, XIV.*

239. Prior to the second scheduled trial of this case, this evidence of a violation of Plaintiff's rights was hidden from the defense, both intentionally by the Defendants and because of the wholesale violation of Plaintiff's right to disclosure of favorable evidence.

FALSE ARREST & DETENTION

240. Plaintiff reincorporates all other allegations in his complaint in this cause of action.

241. Plaintiff was falsely arrested and detained in the absence of an adequate showing of probable cause, where the officers knew or should have known that the evidence forming the basis of his arrest was false or insufficiently reliable to justify an arrest for first degree murder. *U.S. CONST. amend. IV, XIV; La. Const. Art. I, §§ 2, 3, 5, 13.*

242. A reasonably trained officer in the position of Defendants SMALL and DEAL would have known that the facts in the possession of the NOPD did not justify the arrest of Defendant on charges of first degree murder. Defendant SMALL perjured himself and directly misled the magistrate to secure an arrest and search warrant.

243. Prior to the second scheduled trial of this case, this evidence of a violation of Plaintiff's rights was hidden from the defense, both intentionally by the Defendants and because of the wholesale violation of Plaintiff's right to disclosure of favorable evidence.

ILLEGAL SEARCHES & SEIZURES

244. Plaintiff reincorporates all other allegations in his complaint in this cause of action.

245. Plaintiff's residence was searched in the absence of an adequate showing or probable cause, where the officers knew or should have known that the evidence forming the basis of his arrest was false or insufficiently reliable to justify such a search

and seizure. *U.S. CONST. amend. IV, XIV; La. Const. Art. I, §§ 2, 3, 5, 13.*

246. A reasonably trained officer in the position of Defendants SMALL and DEAL would have known that the facts in the possession of the NOPD did not justify such a search and seizure. Defendant SMALL perjured himself and misled the magistrate in terms of the weakness of the case against Plaintiff and the likelihood of finding specified inculpatory evidence.

247. Prior to the second scheduled trial of this case, this evidence of a violation of Plaintiff's rights was hidden from the defense, both intentionally by the Defendants and because of the wholesale violation of Plaintiff's right to disclosure of favorable evidence.

DEFAMATION - § 1983 CAUSE OF ACTION

248. Plaintiff reincorporates all other allegations in his complaint in this cause of action.

249. The Defendants, either directly or through the NOPD or DA's public information officers, defamed Plaintiff by stating that he was the perpetrator of this most horrible crime, where the statements were clearly false.

250. Plaintiff suffered damage to his reputation, stigma plus various other extreme damages as a result of this defamation. This included, *inter alia*, the following specific damages from the defamation:

251. The direct cause of stress from being publically, repeatedly and falsely labeled a first degree murderer who had

killed an innocent person in the French Quarter.

252. The irrevocable tainting of his relationship with his family, most of whom were forced to leave the New Orleans area by the stigma that attached to being related to a convicted murderer.

253. A loss of education, job training, employment, and wages over the period of years of his incarceration.

254. All the other injuries set forth in the other paragraphs of this complaint.

DEFAMATION - STATE CAUSE OF ACTION

255. Plaintiff reincorporates all other allegations in his complaint in this cause of action.

256. All Defendants defamed Plaintiff by stating that he was the perpetrator of this most horrible crime, where the statements were clearly false. *See, e.g., La. R.S. § 14:47.*

257. Plaintiff suffered stigma plus various other extreme damages as a result of this defamation. This included all the other injuries set forth in the other paragraphs of this complaint.

INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

258. Plaintiff reincorporates all other allegations in his complaint in this cause of action.

259. All Defendants intentionally inflicted emotional distress on Plaintiff through their actions in this case.

MALICIOUS PROSECUTION

260. Plaintiff reincorporates all other allegations in his complaint in this cause of action.

261. The actions of the Defendants constitute malicious prosecution of Plaintiff in violation of both State and federal law. *See* U.S. CONST. amend. IV, XIV.

262. Plaintiff was charged or indicted with the offense of first degree murder as a result of the actions committed by the Defendants. The Defendants intended to cause the prosecution of Plaintiff by their illegal actions.

263. There was not probable cause against Plaintiff to institute and pursue this charge.

264. Defendants acted against Plaintiff with malice.

SUPERVISORY & MUNICIPAL LIABILITY

265. Plaintiff reincorporates all other allegations in his complaint in this cause of action.

266. Defendants the CITY OF NEW ORLEANS, PENNINGTON, and LANDRY, are responsible for the actions of their subordinates as set forth elsewhere in this Complaint.

267. Defendants the CITY OF NEW ORLEANS, PENNINGTON, and CONNICK continue to indemnify and hold harmless officers in their employment and who they supervise, and provide them with free legal counsel, even where it is illegal as a matter of state law for them to do so, and a violation of public policy.

268. These Defendants are required by law not to indemnify or hold harmless consequences that stem from intentional torts or criminal actions taken by their subordinates. *See La. R.S. § 13:5108.1(A)* (excluding from right to indemnification or payment of attorneys fees acts where the employee causes "damages . . . [that] result from the intentional wrongful act or gross negligence of such officer or employee"); *accord La. R.S. § 13:5108.2(B).*

269. It is against public policy to enforce or allow any contractual arrangement that indemnifies the insured or beneficiary either for the cost of representation and any damages in a criminal case based on a possible future criminal or intentional tortious activity.

270. Despite the clear dictates of law, Defendants continue to indemnify the subordinate officers in an illegal manner, which specifically encourages the subordinate officers to commit such actions secure in the knowledge that it is very unlikely that they will suffer adverse financial consequences as a result of their intentional illegal and tortious actions.

271. As has long been obvious to all Defendants, this encourages and facilitates the illegal actions of the subordinate defendants, as elsewhere alleged in this complaint.

272. On the other hand, litigation is discouraged against the CITY OF NEW ORLEANS since the City never pays its bills until years later where a judgement is secured in civil court. This prevents many valid claims from being brought.

273. There is inadequate supervision, training and discipline at the Police Academy. Individual recruits, cadets and trainees who should be screened out and removed from the

police force prior to being accepted as police officers are in fact permitted to graduate and join the force, including the defendant officers here.

274. There is inadequate supervision, training and discipline in the NOPD. Officers who should be screened out and removed from the police force for their unfitness to serve are in fact permitted to remain on the force, and are even promoted, including the defendant officers here.

275. Police officers are not properly monitored or supervised. Annual evaluations are either not conducted or are meaningless, and supervisors are not held accountable for the actions of their subordinates. This renders inevitable the kinds of abuses that took place in this case.

276. The public integrity division (PID) of the NOPD, along with other similar review divisions, have been grossly inadequate when it comes to investigating civilian complaints concerning police misconduct. In particular, investigations of falsification of evidence and acts involving a lack of truthfulness in criminal and capital criminal cases, rarely sustain allegations even if there is merit to the complaints.

277. At times, officers among those who have committed the abuses in this case have, rather than being sanctioned for their misconduct, been placed in the PID when they should have been investigated by it.

278. It is also the policy and practice of the CITY OF NEW ORLEANS not to protect citizens who come forward as witnesses and complainants against police officers for acts of misconduct, resulting in fear of harassment, retaliation or threats made against them.

279. Where cases do result in a complaint being reviewed by the City Civil Service Commission there is an inevitable conflict of interest in that the City Attorney's Office, which is charged with prosecuting these offenses, is the same office that provides representation to the office and the City of New Orleans in civil litigation. As a result, the cases are inadequately prosecuted.

280. The CITY OF NEW ORLEANS has taken insufficient proactive measures to prevent the kinds of abuses that happened in this case from happening.

281. In recent years, indeed extending for a long time, there has been a pattern of illegal activity such as is alleged in this complaint.

282. Defendants the CITY OF NEW ORLEANS, PENNINGTON, and CONNICK are charged and required by law to take action to ensure that subordinate officers not commit criminal and tortious acts.

283. Despite a pattern of criminal and tortious acts in the NOPD the Defendants the CITY OF NEW ORLEANS, PENNINGTON, and CONNICK have not taken action to prevent this kind of activity.

284. Time after time, Officers have conspired to falsify evidence and commit perjury in criminal cases with no consequences. Indeed, officers know that it is *de facto* Department policy they will be allowed to remain as active officers in the NOPD despite falsifying evidence, conspiring to commit perjury (even in capital cases), and violating the constitutional rights of suspect. Officers know that it is *de facto* Department policy that there will be no meaningful

investigation of the events, and no meaningful disciplinary action taken, for these offenses.

285. Defendants the CITY OF NEW ORLEANS, PENNINGTON, and CONNICK have failed to establish and enforce departmental regulations that would punish those found to have committed criminal and tortious acts such as those set forth in this complaint. These Defendants are required to establish, implement and enforce such regulations.

286. Officers have demonstrated their own prejudice in terms of racial, gender and sexual orientation, without any meaningful consequences.

287. Defendants the CITY OF NEW ORLEANS, PENNINGTON, and CONNICK had an established and implemented policy mentality where one officer is strongly discouraged from reporting the misconduct of another, and where those who do make such reports are punished and ostracized. Defendants have not taken meaningful and effective steps to redress this and prevent it from prejudicing Plaintiff and others like him.

288. Defendant CONNICK has, as detailed in the paragraphs above, been well aware of, and encouraged, his subordinates in their failure to follow the law as well as to provide the discovery mandated by law and the constitution. Defendant CONNICK has been vocal in his support of subordinates who have committed criminal or unethical misconduct.

289. Defendant CONNICK has repeatedly and consistently failed to take any action against officers of the NOPD who have committed perjury when presented as witnesses by his office.

He has also taken no meaningful steps to encourage his own employees to prevent such criminal misconduct, or even report it when it occurred. For example, when Office Joe Tafaro patently, committed perjury in the trial of *State v. Ricky Coston*, denying a statement that had been represented as true by A.D.A. Glenn Woods, Woods refused to correct Tafaro or take any steps to prevent him from committing perjury.

290. The same approach (a blind eye to misconduct as long as it is committed on behalf of the prosecution) applies to all witnesses. For example, in the *Coston* case when another prosecution witness was identified by Judge Julian Parker as having committed perjury in the same trial, A.D.A. Woods promised the jury that he would "do his job" in pursuing perjury charges, but never took any steps.

291. Defendants the CITY OF NEW ORLEANS, PENNINGTON and CONNICK have failed to adequately train subordinates to ensure that they would not commit these kinds of actions, or establish and apply effective on-going evaluation procedures that would help prevent the misconduct alleged in this complaint.

292. The failure by Defendants the CITY OF NEW ORLEANS, PENNINGTON, and CONNICK to take action regarding these matters confirms the existence of a policy, stated or unstated, tolerating these kinds of violations of the rights of those in Plaintiff's position.

293. Defendants the CITY OF NEW ORLEANS, PENNINGTON, and CONNICK have retained those who should have been dismissed, knowing the risk this posed to persons such as Plaintiff.

294. Defendants the CITY OF NEW ORLEANS, PENNINGTON, and CONNICK had actual or constructive knowledge that these subordinates and employees were engaged in conduct that posed a pervasive and unreasonable risk of constitutional injury to citizens like the plaintiff.

295. The response of Defendants the CITY OF NEW ORLEANS, PENNINGTON, and CONNICK to that knowledge was so inadequate as to show deliberate indifference to or tacit authorization of the alleged offensive practices.

296. There was an affirmative causal link between the supervisor's inaction and the particular constitutional injury suffered by the plaintiff.

297. Defendants SMALL, DEAL, JORDAN, KENNEDY and BERRY were emboldened and encouraged by this acquiescence to improper action by the supervisors in charge of them. This was a clearly foreseeable consequence of the supervisors' failure to take proper action.

DAMAGES

298. As a result of the actions of the Defendants, Plaintiff suffered from being wrongfully arrested, detained and prosecuted for almost four years. Plaintiff was held for many months in the terrible conditions of Death Row, at the Louisiana State Penitentiary, at Angola.

299. Plaintiff was not able to complete his school, in part because he was not in his proper school, and in part because the Louisiana State Penitentiary took the position that since he was going to die there was no point allowing him to complete his

education.

300. Plaintiff has suffered a loss of job training, employment, and wages during the four-year period of his incarceration.

301. Plaintiff lost the friendship and companionship of others who now view him with suspicion given the taint upon his reputation. He was not able to enjoy those things that a child normally enjoys while growing up somewhere other than Death Row.

302. Plaintiff suffered damage to his reputation.

303. Plaintiff has suffered mental and psychological stress as a result of his being publically, repeatedly and falsely prosecuted for being a first degree murderer who killed a defenseless and innocent person. In particular, he suffered at the hands of Defendant JORDAN who repeatedly and acrimoniously labeled him an animal and a killer both in court and outside it.

304. Plaintiff has suffered the irrevocable tainting of his relationship with his family, many of whom have been forced to relocate away from the New Orleans area due to the overwhelmingly negative publicity in his case.

305. All the other injuries set forth in the other paragraphs of this complaint.

AVOIDING A CONFLICT OF INTEREST

306. Plaintiff reincorporates all other allegations in his complaint in this cause of action.

307. The Defendants should be enjoined from using the same counsel for all Defendants, since this creates an inevitable conflict of interest. *Dunton v. County of Suffolk*, 729 F.2d 903 (2d Cir.), *vacated in part on other grounds*, 748 F.2d 69 (2d Cir. 1984) (reversal where defendants' counsel had conflict of interest, noting the responsibility of Plaintiff's counsel to raise the issue).

308. The Defendants have radically opposing positions. For example, Defendants the CITY OF NEW ORLEANS, PENNINGTON, and LANDRY, would be best served by taking the position that they do not want the individual defendants represented at municipal expense. However, the individual defendants clearly want their legal expenses paid by the municipality. Defendants the CITY OF NEW ORLEANS, PENNINGTON, and CONNICK would be best served by taking the position that the individual defendants are effectively sanctioned for their misconduct, while the individual defendants would be best served by arguing that they have not done anything that merits severe sanction.

309. As a matter of State law, the burden is on counsel for the Defendants immediately to assess the presence of such a conflict and to take remedial action. *See La. R.S. 13:5108.2(C)(4).*

310. Counsel is also charged to determine whether the acts of the "client" are intentional or grossly negligent, as defined by law. *See La. R.S. 13:5108.2(C)(3).* This places counsel in an intolerable conflict, since he must both represent the client and determine whether the client has a cause worthy of free representation.

311. It cannot be Plaintiff's burden to do more than bring

this issue to the attention of the Court. However, Plaintiff respectfully suggests that the issue should be resolved immediately to avoid possible consequences later in the case.

PRAYER FOR RELIEF

In light of the foregoing, the Plaintiff requests the following relief:

(A) compensatory damages from the Defendants, jointly and severally;

(B) punitive damages from the individual defendants, jointly and severally, for the malicious, wilful and wanton actions done in reckless disregard of Plaintiff's rights as set forth above;

(C) declaratory and injunctive relief declaring illegal and against public policy any contract or agreement that provides for the indemnification or insurance of any police officer or public employee for intentional criminal or tortious acts and for the costs and expenses of counsel on such charges.

(D) injunctive relief against the Defendants and their employees from retaliating against Plaintiff or those representing him in his case;

(E) pre-judgment and post-judgment interest;

(F) reasonable costs and attorneys' fees;

(G) a prohibition against the Defendants using the same counsel where there is a conflict of interest; and

(H) such other relief to which the Plaintiff is entitled.

Dated the 7th day of January, 2000.

Respectfully Submitted,

/s/ Kern Reese
KERN REESE
La. Bar No. 11143
1433 N. Claiborne Avenue
New Orleans, La. 70116
(504) 944-1894

CLIVE A. STAFFORD SMITH
La. Bar No. 14444
636 Baronne Street
New Orleans, La. 70113
(504) 558-9867

REGINALD J. LAURENT
La. Bar No. 17683
1555 Poydras St.
New Orleans, La.
(504) 593-9500

Attorneys for the Plaintiff

(2)

Supreme Court, U.S.
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No. 02-1862

IN THE

Supreme Court of the United States

SHAREEF COUSIN,

Petitioner,

v.

BYRON BERRY AND ROGER JORDAN,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

WILLIAM D. AARON, JR
Counsel of Record
SPECIAL PROSECUTOR
ORLEANS PARISH DISTRICT
ATTORNEY'S OFFICE
RICHARD A. GOINS
SPECIAL PROSECUTOR
ORLEANS PARISH DISTRICT
ATTORNEY'S OFFICE
1010 Common Street, Suite 2600
New Orleans, LA 70112
(504) 569-1800

Attorneys for Respondents, Byron Berry, Roger Jordan, and Harry Connick Individually and in his capacity as District Attorney of New Orleans

182675

CP
COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

19 pp

QUESTIONS PRESENTED FOR REVIEW

1. Did the Fifth Circuit apply the correct law, with respect to the doctrine of prosecutorial immunity, to the facts of the case before it, although the D.C. Circuit in *Moore v. Valder*, 65 F.3d 189 (D.C. Cir. 1995) may have had a narrower interpretation of the same law?

2. Is the Fifth Circuit's decision with respect to the advocacy role of a prosecutor consistent with *Imbler v. Pachtman*, 424 U.S. 409, 96 S. Ct. 984, 47 L. Ed. 2d 128 (1976) and *Buckley v. Fitzsimmons*, 509 U.S. 259, 113 S. Ct. 2606 (1993)?

3. Is a prosecutor functioning as an advocate for the State, thereby entitling the prosecutor to absolute immunity, when he interviews a witness for the purpose of allegedly securing false testimony to be presented at the pending trial of an already identified suspect, rather than for the purpose of identifying a suspect or establishing probable cause?

4. Is a prosecutor functioning as an advocate for the State, thereby entitling the prosecutor to absolute immunity, when during an ongoing trial, and directly related to that trial process and for the purpose of securing a conviction, he allegedly detains witnesses, thus preventing them from testifying at the trial?

5. Is a prosecutor functioning as an advocate for the State, thereby entitling the prosecutor to absolute immunity, when he allegedly fails to disclose exculpatory evidence?

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Reasons for Denying the Petition 1

I. Although the D.C. Circuit in *Moore v. Valder*, 65 F.3d 189 (D.C. Cir. 1995) may have had a narrower interpretation of the law, the law that the Fifth Circuit applied to the facts of the case was correct, and accordingly, the Fifth Circuit has not entered a decision in conflict with the D.C. Circuit or the United States Supreme Court. 1

II. The Fifth Circuit's decision with respect to the advocacy role of a prosecutor is consistent with *Imbler v. Pachtman*, 424 U.S. 409, 96 S. Ct. 984, 47 L. Ed. 2d 128 (1976) and *Buckley v. Fitzsimmons*, 509 U.S. 259, 113 S. Ct. 2606 (1993). 3

III. The Fifth Circuit's decision is correct because a prosecutor is functioning as an advocate for the State, thereby entitling the prosecutor to absolute immunity, when he interviews a witness for the purpose of allegedly securing

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false testimony to be presented at the pending trial of an already identified suspect, rather than for the purpose of identifying a suspect or establishing probable cause. 5

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REASONS FOR DENYING THE PETITION

Respondents file this brief in opposition to point out numerous misstatements and material omissions in the Petition for Writ of Certiorari.

I. Although the D.C. Circuit in *Moore v. Valder*, 65 F.3d 189 (D.C. Cir. 1995) may have had a narrower interpretation of the law, the law that the Fifth Circuit applied to the facts of the case was correct, and accordingly, the Fifth Circuit has not entered a decision in conflict with the D.C. Circuit or the United States Supreme Court.

To support its Petition for Writ of Certiorari, Petitioner alleges that this Honorable Court should invoke its judicial discretion because the Fifth Circuit has entered a decision in conflict with the decisions of *Moore v. Valder*, 65 F.3d 189 (D.C. Cir. 1995) and contrary to the decisions of this Court in *Buckley v. Fitzsimmons*, 509 U.S. 259 (1993) and *Kalina v. Fletcher*, 522 U.S. 118 (1997). However, as shown herein, Respondents respectfully show that the Fifth Circuit applied the correct law in accordance with and consistent with the prior decisions of this Court.

Undoubtedly, the rule of law with respect to the doctrine of prosecutorial immunity is that prosecutors are absolutely immune from liability under 42 U.S.C. § 1983 for their conduct in initiating a prosecution and in presenting the State's case, insofar as that conduct is intimately associated with the judicial phase of the criminal process. *Burns v. Reed*, 500 U.S. 478, 86, 111 S. Ct. 1934, 114 L. Ed. 2d 547 (1991); *Imbler v. Pachtman*, 424 U.S. 409, 430-431, 96 S. Ct. 984, 47 L. Ed. 2d 128 (1976). This prosecutorial immunity applies

to any and all actions which occur in the course of the prosecutor's role as an advocate for the State. *Buckely v. Fitzsimmons*, 509 U.S. 259, 272, 113 S. Ct. 2606, 125 L. Ed. 2d 209 (1993). Accordingly, to determine whether a prosecutor is acting in his role as an advocate for the State, the test is whether or not the prosecutor's conduct is related to his prosecutorial function. *Imbler v. Pachtman*, 424 U.S. 409, 430-431, 96 S. Ct. 984, 47 L. Ed. 2d 128 (1976).

Applying this test to the specific facts of this case, the Fifth Circuit recognized that its conclusion differs from the conclusion reached in *Moore v. Valder*, 65 F.3d 189 (D.C. Cir. 1995). *See* Pet. App. 10a. n.6. However, this is not the result of the Fifth Circuit misinterpreting the law or using incorrect law. The difference results from the fact that the D.C. Circuit has a narrower conception of the advocatory role, as recognized by the Fifth Circuit. *See* Pet. App. 10a. n.6.

Both Circuits agree on *how* to draw the line between the prosecutorial function and non-prosecutorial function, but they may disagree on *where* to draw the line. This does not result in the Fifth Circuit entering a decision in conflict with the D.C. Circuit, but rather this is the result of two separate courts reaching different results, by applying the same law to it's own set of unique facts. Accordingly, this Honorable Court should not grant the Petition for Writ of Certiorari.

II. The Fifth Circuit's decision with respect to the advocacy role of a prosecutor is consistent with *Imbler v. Pachtman*, 424 U.S. 409, 96 S. Ct. 984, 47 L. Ed. 2d 128 (1976) and *Buckley v. Fitzsimmons*, 509 U.S. 259, 113 S. Ct. 2606 (1993).

If there is a conflict in decisions, the conflict is with *Moore v. Valder*, 65 F.3d 189 (D.C. Cir. 1995) and the decisions of the U.S. Supreme Court. In other words, the Fifth Circuit's decision is consistent with *Imbler v. Pachtman*, 424 U.S. 409, 430-431, 96 S. Ct. 984, 47 L. Ed. 2d 128 (1976) and *Buckely v. Fitzsimmons*, 509 U.S. 259, 274, 113 S. Ct. 2606, 125 L. Ed. 2d 209 (1993).

As stated above, in determining whether a prosecutor is acting in his role as an advocate for the State, the test is whether or not the prosecutor's conduct is related to his prosecutorial function. *Imbler v. Pachtman*, 424 U.S. 409, 430-431, 96 S. Ct. 984, 47 L. Ed. 2d 128 (1976). A significant factor used in evaluating the prosecutorial function of prosecutorial conduct is whether or not probable cause exists with respect to a particular suspect. *See Buckely v. Fitzsimmons*, 509 U.S. 259, 274, 113 S. Ct. 2606, 125 L. Ed. 2d 209 (1993). As stated in *Buckely*, "[t]here is a difference between the advocate's role in evaluating evidence and interviewing witnesses as he prepares for trial, on the one hand, and the detective's role in searching for clues and corroboration that might give him probable cause to recommend that a suspect be arrested, on the hand." *Id.* at 275, 113 S. Ct. 2602. Obviously, the former is a prosecutorial function, and the latter is an investigatory function. Additionally, *Imbler v. Pachtman*, 424 U.S. 409, 431 n.33, 96 S. Ct. 984, 47 L. Ed. 2d 128 (1976) recognized that

"[p]reparation, both for the initiation of the criminal process and for a trial, may require the *obtaining*, reviewing, and evaluating of evidence." (emphasis added).

The Fifth Circuit specifically acknowledged that the determination of probable cause, alone, "does not guarantee a prosecutor absolute immunity from liability for all actions taken afterwards." *See* Pet. App. 10a, *quoting Buckely v. Fitzsimmons*, 509 U.S. at 274 n.5. However, consistent with *Imbler v. Pachtman*, *supra*, and *Buckely v. Fitzsimmons*, *supra*, the Fifth Circuit correctly held that the existence of probable cause with respect to a particular subject is relevant factor to be used in evaluating the advocacy nature of prosecutorial conduct. *See* Pet. App. 10a.

In evaluating whether a prosecutor's conduct is related to a prosecutorial function, as compared to an investigatory function, it is not error for a Court to consider whether or not probable cause exists with respect to a particular suspect. If a prosecutor interviews a witness for the purpose of identifying a suspect or establishing probable cause, then the prosecutor's conduct is more likely to be an investigatory function. However, if a prosecutor interviews a witness for the purpose of securing evidence that will be used at the trial of an already identified suspect, then the prosecutor's conduct is more likely to be an prosecutorial function. *See Hill v. City of New York*, 45 F.3d 653, 662-63 (2nd Cir. 1995) (holding that the existence of probable cause determines whether fabrication of evidence is investigatory or advocatory); *See also Milstein v. Cooley*, 257 F.3d 1004, 1011 (9th Cir. 2001) (holding that fabrication of evidence was not protected by absolute immunity because there was no probable cause).

Accordingly, the Fifth Circuit's decision is consistent with *Imbler v. Pachtman*, *supra*, and *Buckely v. Fitzsimmons*, *supra*, and the Petition for Writ of Certiorari should be denied.

III. The Fifth Circuit's decision is correct because a prosecutor is functioning as an advocate for the State, thereby entitling the prosecutor to absolute immunity, when he interviews a witness for the purpose of allegedly securing false testimony to be presented at the pending trial of an already identified suspect, rather than for the purpose of identifying a suspect or establishing probable cause.

It is well-settled that a State's prosecuting attorney, acting within the scope of his duties in initiating and pursuing a criminal prosecution and in presenting the State's case, is absolutely immune in his individual capacity from a civil suit for damages under 42 U.S.C. § 1983 for alleged deprivations of the accused's constitutional rights. *Imbler v. Pachtman*, 424 U.S. 409, 96 S. Ct. 984 (1976). In so deciding, the U.S. Supreme Court reasoned that the role of the prosecutor is so integral to the judicial process as to deserve this level of protection in order to insure prosecutorial independence of judgment. The absolute immunity recognized in *Imbler* has been applied to claims involving allegations of fabrication of evidence and coercion of perjured testimony. *See Lee v. Willins*, 617 F.2d 320 (2nd Cir. 1980); *See also Kerr v. Lyford*, 171 F.3d 330 (5th Cir. 1999) (allegations of securing an indictment on the basis of and presenting false, coerced and fabricated evidence); *Carter v. Burch*, 34 F.3d 257 (4th Cir. 1994) (allegations of withholding *Brady* material and presenting false testimony); *Hill v. City of New York*, 45 F.3d 653

(2nd Cir. 1995) (allegations of malicious prosecution, presenting false testimony to and withholding exculpatory information from the Grand Jury, and deliberately suppressing *Brady* material).

As stated by the Second Circuit, "[p]rosecutorial immunity from § 1983 liability is broadly defined, covering virtually all acts, regardless of motivation, associated with [the prosecutor's] function as an advocate." *Hill v. New York*, *supra*, *citing Dory v. Ryan*, 25 F.3d 81, 83 (2nd Cir. 1994).

Petitioner complains that Respondents interviewed witnesses whose names did not appear on the police reports, specifically James Rowell. Petitioner alleges that in these interviews, Jordan suborned perjury by these witnesses, encouraging and/or coercing them to lie on behalf of the State and against the Petitioner, Shareef Cousin, at his criminal trial. While Respondents have strenuously and genuinely disputed the facts underlying these allegations, it is respectfully suggested that this dispute is not material to a determination of whether or not the doctrine of absolute immunity applies to the Petitioner's § 1983 suit. In any event, Petitioner has attempted to criticize and distinguish the Fifth Circuit's decision, by characterizing Respondent's actions of securing testimony for trial against an identified suspect as being "investigatory." However, as discussed above and herein, the Fifth Circuit's decision is correct because a prosecutor is functioning as an advocate for the State, thereby entitling the prosecutor to absolute immunity, when he allegedly interviews a witness, even for the purpose of allegedly securing false testimony, to be presented at the pending trial of an already identified suspect, rather than for

the purpose of identifying a suspect or establishing probable cause. As aptly put by a district court in South Carolina:

> . . . the duties of the prosecutor in his role as advocate for the State involve actions preliminary to the initiation of a prosecution and actions apart from the courtroom. A prosecuting attorney is required constantly, in the course of his duty as such, to make decisions on a wide variety of sensitive issues. These include questions of whether to present a case to a grand jury, whether to file an information, whether and when to prosecute, whether to dismiss an indictment against particular defendants, which witnesses to call, and what other evidence to present. Preparation, both for the initiation of the criminal process and for a trial, may require the *obtaining*, reviewing, and evaluating of evidence . . .

Cribb v. Pelham, 552 F. Supp. 1217, 1222 (D. S. Car. 1982) (emphasis added).

Prosecutors are quite routinely offered testimony by incarcerated individuals, or by those threatened with incarceration, in return for some kind of favorable treatment in connection with their own legal difficulties. Prosecutors should be able to interview these potential witnesses and deal with them without fear of subsequent civil suit in the event their testimony is adverse to the criminal defendant. Such fear poses a threat of disruption in the orderly administration of justice and the vigorous prosecution of criminal offenses which originally caused the Supreme Court to apply the common law concept of absolute immunity to § 1983 cases in *Imbler v. Pachtman*, 424 U.S. 409, 96 S. Ct. 984, 47 L. Ed. 2d 128 (1976).

Clearly, if a prosecutor is attempting to secure evidence, even fabricated evidence, to be used at trial, against an already identified suspect, then this conduct is a prosecutorial function, as compared to an investigatory function. *See Buckely v. Fitzsimmons*, 509 U.S. 259, 274, 113 S. Ct. 2606, 125 L. Ed. 2d 209 (1993); *Imbler v. Pachtman*, 424 U.S. 409, 430-431, 96 S. Ct. 984, 47 L. Ed. 2d 128 (1976); *Hill v. City of New York*, 45 F.3d 653, 662-63 (2nd Cir. 1995); *Milstein v. Cooley*, 257 F.3d 1004, 1011 (9th Cir. 2001). In such a instance, the prosecutor is functioning as an advocate preparing for trial, rather than functioning as a detective investigating a crime.

IV. The Fifth Circuit's decision is correct because a prosecutor is functioning as an advocate for the State, thereby entitling the prosecutor to absolute immunity, when during an ongoing trial, and directly related to that trial process and for the purpose of securing a conviction, he allegedly detains witnesses, thus preventing them from testifying at the trial.

Plaintiff alleges that the Respondents "detained" certain of Petitioner's alibi witnesses, requiring them to remain in the District Attorney's office [which is immediately adjacent to the courthouse in which the trial was ongoing] during Plaintiff's murder trial, and thereby preventing them from giving testimony. Since clearly Plaintiff has no right or standing to assert the claim which would inure to these witnesses that their constitutional rights to liberty were violated, Plaintiff-appellant apparently argues that the actions of the prosecutors denied to him his constitutional right to call these persons as witnesses at his murder trial. While Defendant-appellees vigorously dispute the factual basis of these claims, it is also respectfully suggested that this dispute

is immaterial in determining whether or not the doctrine of absolute immunity applies to the Petitioner's § 1983 suit.

Again, Petitioner has attempted to criticize and distinguish the Fifth Circuit's decision, by characterizing Respondent's conduct with regard to allegedly detaining the witnesses as not being a prosecutorial function. However, it is hard to imagine conduct more integral to the prosecutor's role of advocate than the marshaling of witnesses during the actual trial. Regardless of what actually took place[1], and regardless of whether or not any action taken by Respondents in this context violated Petitioner's constitutional and/or civil rights, the Respondents are afforded the protection of absolute immunity.

---

1. Although Petitioner complains that certain "alibi" witnesses were hidden from him in the DA's office during the trial, Petitioner's trial counsel testified in his deposition, taken in the course of the proceedings below, that Petitioner's criminal defense counsel never asked that these witnesses be called, nor did the defense ask that an attachment or bench warrant issue to secure their appearance. *See* "Supplemental Memorandum in Support of Motion of Defendants Connick, Berry and Jordan for Dismissal, or, Alternatively, for Summary Judgment", Exhibit 11, Deposition of Roland Belsome, at pp. 28-32. Fifth Circuit Record, Vol. IV, p.1015-1016. Rather, counsel assumed —

> "I do remember the witnesses being gone, and my impression was 'Well, the witness was under subpoena and we talked to them and they said one thing in the hallway and then they get ready to get on the stand and they vanish, maybe they're not going to say what we think they were going to say in the hallway.'"

Clearly, any failure to secure the testimony of certain of the alibi witnesses was the fault of Petitioner's defense counsel and not that of Respondents.

Just as "probable cause" is a relevant factor in determining whether a prosecutor's conduct is related to a prosecutorial function, as contrasted to an investigatory function, so is the "timing of the event" a relevant factor. The Fifth Circuit correctly held that prosecutors should not enjoy immunity just by the mere fact that the conduct occurs during the trial, but rather, the timing of events, while not determinative, can be relevant to the inquiry into determining the prosecutorial function. *Citing Buckely v. Fitzsimmons*, 509 U.S. at 274 (considering the stage of the criminal justice process in determining the functional characterization of the conduct); *Carter v. Burch*, 34 F.3d 257, 263 (4th Cir. 1994) (considering the pendency of judicial proceedings in making an immunity determination).

In fact, this Court held that pendency of judicial proceedings is logically related to the determination whether a prosecutor's activities are intimately associated with the judicial phase of the criminal process, and thus are functions to which the reasons for absolute immunity apply. *Imbler v. Pachtman*, 424 U.S. at 430.

Accordingly, during an ongoing trial, prosecutors who allegedly detain witnesses or otherwise have witnesses removed from the courthouse, in order to secure a conviction, are acting as advocates and are entitled to absolute immunity. *See House v. Belford*, 956 F.2d 711, 721-22 (7th Cir. 1992) (finding that a prosecutor was entitled to absolute immunity for allegedly instructing a deputy to bar the courtroom to the defendant's family and potential witnesses).

V. The Fifth Circuit's decision is correct because a prosecutor is functioning as an advocate for the State, thereby entitling the prosecutor to absolute immunity, when he allegedly fails to disclose exculpatory evidence.

The U.S. Supreme Court first recognized the application of the doctrine of absolute immunity of prosecutors to suits brought pursuant to 42 U.S.C. § 1983 in *Imbler v. Pachtman*, *supra*, and specifically applied that doctrine to bar claims brought therein against a prosecutor which included allegations of the suppression of material evidence. In *Reid v. New Hampshire*, 56 F.3d 332 (1st Cir. 1995), absolute immunity was found to protect state prosecutors from suit based on allegations of willful, deliberate withholding of material in violation of *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), and even in direct violation of trial court orders and even when it was alleged that the prosecutors repeatedly misled the trial court itself throughout the criminal proceedings. "[A] prosecutor cannot be held personally liable for the knowing suppression of exculpatory information." *Robinson v. Volkswagenwerk AG*, 940 F.2d 1369, 1372-73 (10th Cir. 1991).

Petitioner avers that the Court should revisit and adopt an exception to the doctrine of prosecutorial immunity based upon egregious violations of a prosecutor's duty provide the Defendant with exculpatory evidence. However, this Court has held that absolute immunity extends to the deliberate suppression of exculpatory evidence. *Imbler v. Pachtman*, 424 U.S. at 430 n.34.

As noted by the Fifth Circuit, wilful or malicious prosecutorial misconduct is egregious by definition. *See* Pet. App. 15a, *citing Imbler*, 424 U.S. at 430. As stated in the Fifth Circuit's decision,

> Absent immunity, the specter of litigation could undermine prosecutors' ability to exercise their independent judgment with respect to the initiation and conduct of criminal proceedings. In essence, the existence of the doctrine of absolute prosecutorial immunity represents a determination that the need for "vigorous and fearless performance of the prosecutor's duty," justifies its regrettable but necessary cost, namely, that it may sometimes bar the courthouse door to potentially meritorious claims.

See Pet. App. 15a.

CONCLUSION

Respondents respectfully submit that the Petition for Writ of Certiorari presents no genuine issues worthy of United States Supreme Court review, and urges the Court to deny certiorari.

Respectfully submitted,

WILLIAM D. AARON, JR
Counsel of Record
SPECIAL PROSECUTOR
ORLEANS PARISH DISTRICT
ATTORNEY'S OFFICE
RICHARD A. GOINS
SPECIAL PROSECUTOR
ORLEANS PARISH DISTRICT
ATTORNEY'S OFFICE
1010 Common Street, Suite 2600
New Orleans, LA 70112
(504) 569-1800

Attorneys for Respondents, Byron Berry, Roger Jordan, and Harry Connick Individually and in his capacity as District Attorney of New Orleans

(3)

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IN THE

Supreme Court of the United States

SHAREEF COUSIN,
Petitioner,

v.

BYRON BERRY AND ROGER JORDAN,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF

CLIVE A. STAFFORD-SMITH
636 Baronne Street
New Orleans, LA 70113
(504) 558-9867

DONALD B. VERRILLI, JR.
Counsel of Record
IAN HEATH GERSHENGORN
JENNER & BLOCK, LLC
601 Thirteenth Street, N.W.
Washington, DC 20005
(202) 639-6000

September 9, 2003

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MISCELLANEOUS

Douglas J. McNamara, Buckley, Imbler *and* Stare Decisis*: The Present Predicament of Prosecutorial Immunity and an End to Its Absolute Means*, 59 Alb. L. Rev. 1135 (1996) 7

Megan M. Rose, Note, *The Endurance of Prosecutorial Immunity – How the Federal Courts Vitiated* Buckley v. Fitzsimmons, 37 B.C.L. Rev. 1019 (1996)..... 3

REPLY BRIEF

Respondents' Brief in Opposition cannot refute the principal point in the Petition: As exemplified by the Fifth Circuit's decision in this case, the courts of appeals have engaged in massive and systematic resistance to this Court's case law on prosecutorial absolute immunity. Indeed, when an isolated court attempts to apply that case law faithfully – as did the D.C. Circuit in *Moore v. Valder*, 65 F.3d 189 (D.C. Cir. 1995) – the decision is dismissed unapologetically as out of step with the law in the lower courts. *See* Pet. App. at 10a n.6. The result is a series of decisions such as the one reached by the Fifth Circuit below, holding that prosecutors merit absolute immunity for a range of conduct – including coercion and fabrication of false evidence, detention of defense witnesses to prevent them from testifying, and wholesale suppression of obviously exculpatory evidence – even when there is no common-law tradition of immunity for that conduct, and even when the conduct at issue is plainly outside any legitimate understanding of the advocacy function. In the courts of appeals, then, cases such as *Buckley v. Fitzsimmons*, 509 U.S. 259 (1993), *Burns v. Reed*, 500 U.S. 478 (1991), and *Kalina v. Fletcher*, 522 U.S. 118 (1997), are essentially a dead letter, confined to their particular facts. Even egregious prosecutorial misconduct such as that alleged here goes unpunished. Review by this Court is thus urgently needed.

1. The Opposition maintains that the analysis routinely applied by the Fifth Circuit and the vast majority of other Circuits is entirely consistent with *Buckley*, *Kalina*, and the rest of this Court's recent immunity decisions. But, as used by respondents and the courts of appeals, those cases are virtually unrecognizable.

This Court has emphasized, for example, that lower courts should be "quite sparing" in the recognition of absolute immunity, *Buckley*, 509 U.S. at 269 (internal quotation marks omitted), reflecting the presumption "that qualified rather than absolute immunity is sufficient to protect government officials in the exercise of their duties." *Burns*, 500 U.S. at 486-87. But the lower courts' application of immunity has been anything but sparing.

Indeed, as demonstrated in the Petition and unrebutted by the Opposition, the courts of appeals have blatantly disregarded this Court's admonition, with the Fifth Circuit a particularly egregious offender. *See, e.g.*, Pet. App. 6a-18a (absolute immunity for a range of prosecutorial misconduct); *Brandley v. Keeshan*, 64 F.3d 196, 201 (5th Cir. 1995) (absolute immunity for allegations that prosecutor intimidated witnesses in an effort to suppress their testimony); *Mowbray v. Cameron County*, 274 F.3d 269, 276-77 (5th Cir. 2001) (absolute immunity for allegations that prosecutor "shop[ed] for experts" to support baseless theory), *cert. denied*, 535 U.S. 1055 (2002); *Hill v. City of New York*, 45 F.3d 653, 662 (2d Cir. 1995) (prosecutor is absolutely immune for allegations of "deliberate fabrication of false evidence" to the extent the fabrication involves out-of-court efforts to control a witness that "are made subsequent to the decision to indict"); *Carter v. Burch*, 34 F.3d 257, 261-63 (4th Cir. 1994) (absolute prosecutorial immunity is appropriate for allegation that prosecutor "coached [the witness] not to testify" in a way that would have helped the defendant). Indeed, it is revealing that, although the Court's recent cases have all denied absolute immunity to prosecutors at least in part, *see, e.g.*, *Burns*, 500 U.S. at 492-96; *Buckley*, 509 U.S. at 271-78; *Kalina*, 522 U.S. at 129-31, cases in the courts of appeals denying absolute immunity for prosecutorial misconduct are virtually

non-existent. *See generally* Megan M. Rose, Note, *The Endurance of Prosecutorial Immunity – How the Federal Courts Vitiated* Buckley v. Fitzsimmons, 37 B.C.L. Rev. 1019, 1019-20 (1996) ("When the United States Supreme Court handed down its opinion in *Buckley v. Fitzsimmons* in June 1993, the decision was heralded as the beginning of the end of absolute prosecutorial immunity. . . . Whatever threat *Buckley* may have posed to the highly deferential doctrine of prosecutorial immunity, however, has not yet materialized.") (footnote omitted).

2. The Opposition seeks to obscure the wholesale abandonment of this Court's immunity jurisprudence by suggesting that prosecutors are "functioning as an advocate for the State" when they fabricate testimony and when the detain defense witnesses to prevent them from testifying. Opp. at 5, 8. But the arguments in the Opposition serve principally to illustrate how far the courts of appeals in general and the Fifth Circuit in particular have strayed.

With respect to the fabrication of testimony, for example, the Fifth Circuit and the Opposition frankly acknowledge that the decision below creates a direct conflict with the D.C. Circuit's decision in *Moore v. Valder*, 65 F.3d 189 (D.C. Cir. 1995). *See* Opp. at 2 ("[T]he D.C. Circuit has a narrower conception of the advocatory role, as recognized by the Fifth Circuit."). But what is most striking is that neither respondents nor the court of appeals even attempt to justify the rejection of the D.C. Circuit's opinion in *Moore* with reference to the analysis that this Court has deemed appropriate. The court of appeals never sought to show, for example, that there was any absolute immunity at common law for such conduct, despite this Court's repeated assertion that a common-law tradition of immunity is a necessary pre-condition for immunity to attach. *See Buckley*, 509 U.S at

268-69 (noting burden on official to "identify a common-law tradition of absolute immunity"); *id.* at 281 (Scalia, J., concurring) (noting, when analyzing claims of absolute immunity for conduct that occurs after there is probable cause, that "reference to the common-law cases will be indispensable" to show when prosecutors can properly claim to be acting "'as advocates'"). *Cf.* Pet. at 23-24 (demonstrating the absence of such common-law tradition).

Nor did the court of appeals seek to justify the extension of immunity to a function such as fabrication of testimony that could just as easily have been performed by a police officer, despite this Court's repeated statements that actions that would otherwise be investigative do not become advocatory merely because they are performed by a prosecutor, even after there is probable cause. *See, e.g.*, *Buckley*, 509 U.S. at 276; *Kalina*, 522 U.S. at 129-30; *see also Moore*, 65 F.3d at 214 (concluding that fabricating testimony involves the misuse of investigative techniques, because it relates to "a typical police function, the collection of evidence to be used in a prosecution").

The treatment of the allegations regarding detention of defense witnesses reflects the same casual disregard for this Court's precedents. Once again, neither the court of appeals nor the Opposition even tried to show that there was a common-law tradition of immunity for the detention of defense witnesses. *Cf.* Pet. at 27 (demonstrating the absence of such a common law tradition).

Nor was there any effort to square the grant of immunity for such conduct with the purposes of § 1983. *See Buckley*, 509 U.S. at 269 (noting relevance of an inquiry into the purposes of § 1983). As noted in the petition, *see* Pet. at 27, such an inquiry would have made clear the inappropriateness of granting absolute immunity – which was intended to give

a prosecutor confidence to present evidence to the triers of fact – for intentional misconduct that prevents critical exculpatory evidence from reaching the judge and jury.

Finally, there was no effort to explain why the detention of defense witnesses to prevent them from testifying requires any special legal training or skill. *See, e.g.*, *Buckley*, 509 U.S. at 276; *Kalina*, 522 U.S. at 129-30. Nor would such an effort have succeeded, because (as respondents' use of the term "marshaling" nicely illustrates) detaining witnesses in the manner alleged could be performed by anyone in the courthouse, including a police officer, marshal, or member of the public.[1]

---

[1] Respondents urge that the Petition be denied because the "failure to secure the testimony of certain of the alibi witnesses was the fault of Petitioner's defense counsel and not that of Respondents." Opp. at 9 n.1. This effort to create a factual dispute is entirely inappropriate at this stage in the proceedings because, as the Fifth Circuit recognized, petitioner's allegations must be taken as true. *See, e.g.*, *Buckley*, 509 U.S. at 261 (assuming that petitioner's allegations are true and that they set forth constitutional violations for which § 1983 provides a remedy).

In any event, Respondents' argument is baseless. Respondents *conceded* that they told the witnesses to wait in the prosecutors' offices, rather than at the courthouse. Complaint ¶ 171 (Pet. App. 90a); Plaintiff's Reply Br., Ex. F, at 57 (providing district court with testimony from respondents admitting that they took at least three and perhaps four defense witnesses to the District Attorney's offices). Moreover, Cousin's criminal defense attorney – who was trying his first capital murder trial – testified unambiguously that he had told Berry he was trying to locate the witnesses, and that Berry had disclaimed any knowledge of the witnesses' whereabouts. *See* New Trial Tr. at 129 ("I recall [Berry] saying, 'Do you plan on using Michael Doss or any alibi witnesses' whatever it was. I said 'Yes, we do.' Referring to Michael Doss, I said, 'He's not out there right now. We're trying to get him.' [Berry] said, 'Well, let me know. We want him too.' But at no point were we ever informed that he was at the D.A.'s office, because I would have immediately request[ed] that he be brought over.").

Unfortunately, the opinion below is not unique in this regard. Time and again, the Fifth Circuit and the other courts of appeals have replaced the analysis this Court has required with a largely temporal analysis that immunizes virtually all prosecutorial conduct after probable cause as long as it is done "for the purpose of securing a conviction." Opp. at 8; *see, e.g.*, Pet. App. at 16a-17a;[2] *Mowbray*, 274 F.3d at 276-77(no analysis of history, purpose, or need for special legal skill or training); *Brandley*, 64 F.3d at 201 (same); *Hill*, 45 F.3d at 662 (relying principally on temporal analysis); *Carter*, 34 F.3d at 261-63 (same).

The time has come for this Court to reaffirm that this Court meant what it said in *Buckley*, *Burns*, and *Kalina*.

3. Finally, with respect to the wholesale suppression of obviously exculpatory evidence, respondents never address the principal point made in the Petition, namely, that *Imbler v. Pachtman*, 424 U.S. 409 (1976), should be reconsidered. As commentators and Justices of this Court have recognized, *Imbler*'s failure to adequately address the common-law roots

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[2] The Fifth Circuit below sought to justify immunity for detention of witnesses on the ground that the conduct happened "during trial." Pet. App. 16a. But the analysis this Court set forth in *Buckley* and *Kalina* expressly rejects such a temporal analysis. *See* Pet. at 22-23. Moreover, to characterize the detention of defense witnesses as having occurred "during trial" is misleading: the conduct alleged did not occur in courtroom, but merely occurred on the days that the trial was taking place. To grant immunity for anything a prosecutor does for the purpose of securing a conviction while a trial happens to be going on – even if the prosecutors actions require no special training or skill, even if there is no historical tradition of immunity for such actions, and even if the actions are intended to prevent evidence from ever reaching the jury – is to flatly reject *Buckley* and *Kalina*. Finally, respondents protest weakly that the Fifth Circuit used the "timing of the event" as a relevant, though not dispositive, factor. Opp. at 10. But the sole factor supporting the decision below was that the conduct occurred "during trial."

of the claimed immunity and its expansive view of absolute immunity is out of touch with this Court's more recent cases. *See, e.g.*, Douglas J. McNamara, Buckley, Imbler *and* Stare Decisis: *The Present Predicament of Prosecutorial Immunity and ar End to Its Absolute Means*, 59 Alb. L. Rev. 1135, 1195 (1996) ("*Imbler* was a misstep along the way of the historical-functional approach, and remains out-of-step with [the Court's] current practice."); *Burns*, 500 U.S. at 505 (Scalia, J., joined by Blackmun and Marshall, JJ., concurring) (refusing to employ the "methodology" in *Imbler* and noting that *Imbler* relied on "a common-law tradition of prosecutorial immunity that developed much later than 1871, and was not even a logical extrapolation from then-established immunities"); *Kalina*, 522 U.S. at 134-35 (Scalia, J., joined by Thomas, J., concurring) (criticizing *Imbler* as "mak[ing] faithful adherence to the common law embodied in §1983 very difficult").

Respondents do not even try to square *Imbler* with the Court's more recent decisions, opting instead to reiterate the uncontested point that *Imbler*'s treatment of absolute immunity for suppression of evidence – in a footnote and in dicta – is consistent with the decision of the court of appeals in this case. But *Imbler*'s decision in this regard is flatly inconsistent with *Buckley* and *Kalina*. As demonstrated in the Petition, the grant of absolute immunity for the unconstitutional suppression of exculpatory evidence has no historical antecedent. *See* Pet. at 28-29. Moreover, such immunity is flatly contrary to the purposes of the absolute immunity doctrine because it provides immunity for actions that deprive the tribunal of relevant evidence. *See id.* at 29. *Imbler*'s grant of absolute immunity for the suppression of exculpatory evidence should be reconsidered.

* * *

The decision below reflects the view of the Fifth Circuit and the other courts of appeals that prosecutors are absolutely immune for virtually all conduct that occurs after there is probable cause. Although it is easy to hypothesize a "parade of horribles" resulting from this unbounded and misguided view of prosecutorial absolute immunity, the Complaint in this case eliminates the need for hypothesis. A sixteen-year-old boy was wrongly convicted of capital murder and spent more than a year on death row for a crime he did not commit. Nothing in this Court's cases justifies granting absolute immunity to the prosecutorial misconduct that is alleged to have brought about that result.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

CLIVE A. STAFFORD-SMITH
636 Baronne Street
New Orleans, LA 70113
(504) 558-9867

DONALD B. VERRILLI, JR.
Counsel of Record
IAN HEATH GERSHENGORN
JENNER & BLOCK, LLC
601 Thirteenth Street, N.W.
Washington, DC 20005
(202) 639-6000

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